No. 405

SUPREME COURT, U.S.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 405

JOHN W. TURNER, JR.,

Appellant,

vs.

WARREN E. WRIGHT, TREASURER OF THE STATE OF ILLINOIS AND RICHARD J. LYONS, DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS;

Appellees.

STATEMENT AS TO JURISDICTION

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STATUTES

The following Illinois statutes, from the 1955 edition of the Illinois Revised Statutes, being the most recent edition in circulation at the time of the preparation of this jurisdictional statement:*

Secs. 172, 172-A Ch. 127 2
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Sec. 439.6 Ch. 120 16
Sec. 439.10 Ch. 120 6
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Sec. 57.1 Ch. 110 2
Sec. 72.26 Ch. 37 2
Sec. 101.39 (1) Ch. 110 12
Sec. 101.39 Ch. 110 12
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*Because of the numerous references to Sec. 3 and 9 of the Illinois use tax act, references to those sections have been omitted.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No.

JOHN W. TURNER, JR.,

Appellant,

vs.

WARREN E. WRIGHT, TREASURER OF THE STATE OF ILLINOIS AND RICHARD J. LYONS, DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

STATEMENT AS TO JURISDICTION

In compliance with Rules 13, and 15 of this Court appellant herewith submits this statement particularly disclosing the basis upon which this court has jurisdiction on appeal to review the judgment of the Supreme Court of Illinois. The judgment was entered on March 20, 1957. (R. 48.) (See Appendix A for judgment.) Appellant filed a petition for rehearing which was denied by the Illinois Supreme Court on May 20, 1957. (R. 51.) Notice of appeal to this court was filed in the Illinois Supreme Court July 17, 1957. (R. 54.)

OPINIONS BELOW

There were two opinions by the Illinois Supreme Court in this case. The first at the November 1956 term held the Illinois use tax act unconstitutional without dissent by any member of the court. (R. 15-23.) (See Appendix B for copy of opinion.) The second opinion given at the March, 1957 term, after the granting of a rehearing to appellee, held the act constitutional, with one judge dissenting. (R. 45-53.) Copies of that opinion and the dissenting opinion are hereto attached as Appendix C. The opinion is reported in 11 Ill. (2) 161, 142 N.E.(2) 84.

NATURE OF PROCEEDING

This is a suit for (1) declaratory judgment and (2) injunction brought by a citizen and taxpayer of Illinois to determine the validity of the Illinois use tax act. The suit originated in the Circuit Court of Cook County, Illinois. The declaratory judgment count of the complaint was brought under the provisions of Sec. 57.1 Ch. 110 Illinois Revised Statutes, 1955. The count for injunction was brought under the provisions of Secs. 172, 172-A Ch. 127 and Sec. 72.26 Ch. 37 Illinois Revised Statutes, 1955. The Circuit Court of Cook County held the act in question did not violate either the constitution of Illinois or the constitution of the United States, and entered a final decree sustaining appellees' motion to dismiss. (Abs. 23.) The Illinois Supreme Court held the act constitutional and affirmed the Circuit Court decree. Appellant then filed a petition for rehearing which the court denied. (R. 51.)

STATUTORY BASIS FOR JURISDICTION

The jurisdiction of this court to review on appeal the judgment of the Illinois Supreme Court is conferred by 28 U.S.C. Sec. 1257 (2).

CASES SUSTAINING JURISDICTION

Cases which sustain the jurisdiction of this court to entertain the appeal from the judgment of the Illinois Supreme Court are *James Stewart and Co.* v. *Sadrakula*, 309 U.S. 94, 1940; *Illinois* v. *Board of Education*, 333 U.S. 203, 1947; *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204, 1946; *Chicago B. and Q. R. Co.* v. *Chicago*, 166 U.S. 226, 1896; *Erie Railroad* v. *Purdy*, 185 U.S. 226, 1901; *Grand River Dam Authority* v. *Grand Hydro*, 335 U.S. 359, 1948; *Abie State Bank* v. *Byron*, 282 U.S. 765, 1931.

THE ILLINOIS USE TAX ACT

The Illinois Use Tax Act is to be found in Secs. 439.1-439.18 Ch. 120 Vol. II pages 816-820, Illinois Revised Statutes, 1955. Its provisions pertinent to this appeal are set forth in Appendix D hereto attached.

QUESTIONS PRESENTED

The following questions are presented by this appeal:

(1) Whether Sec. 9 of the Illinois use tax act (Sec. 439.9 Ch. 120, page 818 Vol. II, Illinois Revised Statutes, 1955) in permitting the retention by a retailer of the tax provided for in said act is a gift of public funds for a private purpose and is a deprivation of private property without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

(2) Whether Sec. 3 of the aforesaid act (Sec. 439.3 Ch. 120, page 817 Vol. II, Illinois Revised Statutes, 1955) in exempting from the payment of taxes under the act all purchasers of personal property at retail whose sellers are exempt from the tax imposed by the Illinois retailers' occupation tax act (Secs. 440-453 Ch. 120, pages 820-831 Vol. II, Illinois Revised Statutes, 1955) is a void and discriminatory classification in violation of the Fourteenth Amendment to the Constitution of the United States.

STATEMENT OF THE CASE

I.

FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

A.

THE NATURE OF ILLINOIS' UNIQUE USE TAX

Twenty-eight other states have use tax acts. The Illinois act is unique. In most of the states an exemption is given from the use tax where a purchase is made within the state imposing the tax. In the few that do not grant outright exemptions, the tax is only due upon a domestic purchase if the local sales or retailers' tax is not paid. (See Appendix E attached for a digest of use tax acts of other states relating to exemptions.)

The Illinois use tax act is unique in two respects, viz.:

(1) There are two taxes rigidly due on all sales of tangible personal property at retail made within the state, the retailers' tax and the use tax. No exemption from the use tax is given in the case of a purchase within the state as do most of the states. Neither is the use tax only due when the retailers' tax is not paid as in the case of those states that do not grant outright exemptions.

(2) In the case of all purchases made within the state, Illinois retailers are the collectors of the tax and retain it as their own. The state does not receive it. The foregoing aspects of the act in question will be more fully discussed later.

In order to fully comprehend the nature of the Illinois use tax, the following observations should first be made as to the Illinois retailers' tax act.

Since 1933 Illinois has had a tax upon retailers measured by the gross receipts from sales (Sec. 441 Ch. 120, p. 821 Vol. II, Illinois Revised Statutes, 1955).*

All retailers must obtain certificates of registration from the Department of Revenue (Sec. 441-A Ch. 120, p. 822 Vol. II, Illinois Revised Statutes, 1955). The retailers' tax is upon the occupation of selling tangible personal property at retail (Sec. 441 Ch. 120, p. 821 Vol. II, Illinois Revised Statutes, 1955). It is an occupation tax upon retailers and not a sales tax. (*Automatic Voting Machine Corp.* v. *Daley*, 409 Ill. 438-447, 1951.) It is a wide tax upon retailers who sell every conceivable type of tangible personal property of whatsoever nature.**

There are certain instances in which the retailers' act does not apply, hereinafter referred to. *That however has to do with the occupation of the seller and not to the type or nature of property he sells.*

The use tax act is equally as sweeping as the retailers' act in so far as the nature or type of personal property

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* The editor of the Illinois Revised Statutes carries the section numbers of the revised statutes in dark type and the actual section numbers of the respective acts in light type immediately following each section number of the revised statutes. For example, Sec. 441 Ch. 120, Illinois Revised Statutes is Section 1 of the retailers' act. Sec. 439.3 Ch. 120 Illinois Revised Statutes is Sec. 3 of the use tax act. Sec. 439.9 Ch. 120 Illinois Revised Statutes is Sec. 9 of the use tax act.

** The retailers' tax is not limited to those keeping stores or disposing of tangible personal property in small quantities. (*Franklin County Coal Co.* v. *Ames*, 359 Ill. 178-183, 1935.) Neither is there any limit from the tax as to the nature of the tangible personal property sold. It includes those who sell every conceivable kind of tangible personal property as for example food (*Brevoort Hotel* v. *Ames*, 360 Ill. 485, 1935), coal (*Franklin County Coal Co.* v. *Ames*, 359 Ill. 178, 1935), shrubs and nursery stock (*Swain Nelson and Sons* v. *Department of Finance*, 365 Ill. 401, 1937), seeds sold to farmers (*Sluis* v. *Nudelman*, 376 Ill. 457, 1941) and caskets and grave clothing sold by undertakers (*Ahern* v. *Nudelman*, 374 Ill. 237, 1940).

is purchased at retail that subjects the purchaser to the tax. The tax is upon the use of all tangible personal property purchased at retail (Sec. 439.3 Ch. 120, p. 817 Vol. II, Illinois Revised Statutes, 1955) and, as in the case of the retailers' act, it admits of no exceptions so far as the type or nature of the tangible personal property is concerned. The exemption, hereinafter referred to, depends solely upon whether the property was purchased from a retailer as defined by the retailers' act.

The use tax is imposed upon all purchasers whether they buy within or without the state. An Illinois retailer having a certificate of registration under the retailers' act need not register under the use tax act. (Sec. 439.6 Ch. 120, p. 818 Vol. II Illinois Revised Statutes, 1955.) The Department of Revenue may permit a retailer without a place of business in Illinois to register under the use tax act as a retailer (*ibid.*). Where a purchaser buys from a retailer with a registration certificate (either a retailer with a place of business in Illinois or a non-resident with an Illinois certificate) the retailer is required to collect the use tax (Sec. 439.3 Ch. 120, p. 817 Vol. II, Illinois Revised Statutes, 1955) and remit it to the Department of Revenue to the extent that he is required to remit (Sec. 439.9 Ch. 120, p. 818 Vol. II, Illinois Revised Statutes, 1955). The tax imposed by the act and not paid to an Illinois retailer or to a non-resident retailer with an Illinois certificate shall be paid to the Department of Revenue, "directly by any person using such property within this state." (Sec. 439.3 Ch. 120, p. 817 Vol. II, Illinois Revised Statutes, 1955.) Where tangible personal property is purchased from a retailer for use in Illinois by one who did not pay the tax to a retailer, he is required to file a return with the Department of Revenue and pay the tax not later than the 15th day of the next calendar month after the tax is due. (Sec. 439.10 Ch. 120, p. 819 Vol. II, Illinois Revised Statutes, 1955.)

Sec. 9 of the act, the validity of which is in issue here, requires a retailer to remit the use tax to the Department of Revenue on the 15th of each calendar month after which it was collected by him beginning September 15, 1955, "But a retailer need not remit that part of any tax collected by him to the extent that he is required to remit and does remit the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property." (Sec. 439.9 Ch. 120, p. 818 Vol. II, Illinois Revised Statutes, 1955.)

Sec. 3 of the act, the validity of which is also in issue here, gives the exemptions. The particular exemption challenged here provides that, "If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all the elements of a sale occurring in Illinois, then the tax imposed by this act shall not apply to the use of such tangible personal property in this state." (Sec. 439.3 Ch. 120, p. 817 Vol. II, Illinois Revised Statutes, 1955.)

B.

THE COMPLAINT

The complaint is in the abstract of record of the Circuit Court of Cook County filed in this case in the Illinois Supreme Court upon the appeal from the Circuit Court of Cook County to the Illinois Supreme Court. The abstract of record has been appended by the Clerk of the Illinois Supreme Court to page 3 of the record certified by the Clerk of the Illinois Supreme Court and filed herein upon the within appeal from the Illinois Supreme Court to the Supreme Court of the United States. All references to pages of the abstract of record are given as "Abs."

As previously shown the complaint is one for (1) declaratory judgment and (2) for injunction and raised the

validity of Sections 3 and 9 of the act in question under the Fourteenth Amendment to the United States Constitution. The suit was brought by plaintiff in his own behalf and also as a representative suit on behalf of all taxpayers similarly situated. In Illinois the practice of a taxpayer bringing a declaratory judgment proceeding and an injunction suit in his own behalf and also as a representative proceeding on behalf of all other taxpayers wherein the validity of a revenue act is drawn in question is approved practice. (*Johnson* v. *Halpin*, 413 Ill. 257-261, 1952.)

The complaint may be summarized as follows:

Plaintiff is a citizen, resident and taxpayer of Illinois. Defendant Warren E. Wright is Treasurer of Illinois. (Abs. 2.) Defendant Richard J. Lyons is Director of the Department of Revenue of Illinois. (Abs. 2.) On August 1, 1955 plaintiff purchased a motor vehicle in Indiana for his own use in Illinois and not for resale. (Abs. 2.) The Indiana seller is a retailer as defined by the use tax act but has no place of business in Illinois or an Illinois retailer's license authorized for the collection of the use tax. (Abs. 2.) Plaintiff paid no tax in Indiana with respect to the sale, use or possession of the motor vehicle. Under the provisions of the use tax act a tax is due from plaintiff to Illinois which he has paid under protest as provided by an act of the Illinois General Assembly in such case made and provided. (Abs. 3.) Section 9 of the act in providing that a retailer need not remit any part of the tax collected by him to the extent that he remits the tax imposed by the retailers' act makes a gift of public funds for a private purpose in violation of the Fourteenth Amendment to the United States Constitution and is therefore unconstitutional. (Abs. 6-7.) The act discriminates in favor of purchasers at retail from persons engaged in service occupations in that such persons are not required to pay

the tax imposed by the act. (Abs. 15.) In this the act is discriminatory in violation of the Fourteenth Amendment to the Constitution of the United States. (Abs. 15.) The act being unconstitutional in its entirety, there is no valid tax that may be imposed under its terms. Defendant Lyons is without lawful authority to collect the tax or administer the act. (Abs. 8-9.) Nevertheless said defendant is unlawfully administering the act and unlawfully claims a tax is due from plaintiff and all other persons who are not retailers as defined by the act who have since August 1, 1957 and will thereafter purchase tangible personal property for use in Illinois who by the terms of the act are given no exemption. (Abs. 9.) A controversy therefore exists between plaintiff and said defendant. Such controversy will not be resolved until there has been a final judicial determination whether the act is constitutional and whether the Department of Revenue can lawfully claim or collect the tax and otherwise lawfully administer the act. (Abs. 9.) There are numerous persons similarly situated as plaintiff who have since August 1, 1955 and will thereafter purchase tangible personal property for use in Illinois and are given no exemption from the act. (Abs. 10.) All members of the class have a common interest with plaintiff in the questions involved in the proceeding and the results sought. (Abs. 10.)

The declaratory judgment count of the complaint prayed for the entry of a declaratory judgment that the court declare that (1) the act is unconstitutional, (2) that defendant Lyons has no authority to enforce or administer the act and (3) that neither plaintiff nor the class represented by him are obliged to pay or owe any tax under the act. (Abs. 10.)

The injunction count of the complaint prayed that defendant Lyons be enjoined from enforcing the act against plaintiff or any members of the class represented by him;

and that defendant Wright be enjoined from transferring the tax paid by plaintiff under protest into the general treasury fund and requiring said defendant to refund plaintiff an account of the tax so paid under protest. (Abs. 12-13.)

C.

DEFENDANTS' DEFENSIVE PLEADING

Defendants' defensive pleading in the Circuit Court of Cook County consisted of a motion to strike and dismiss the complaint, taking issue with plaintiff as to whether Sections 9 and 3 of the act in question violate the Fourteenth Amendment to the United States. (Abs. 16-23.) In Illinois such a motion admits all facts in a complaint well pleaded, (*Pease* v. *Kendall*, 391 Ill. 193-197, 1945) and raises an issue of law (*Economy Auto Insurance Co.* v. *Brown*, 334 Ill. App. 579-585, 1948).

II.

STAGES IN PROCEEDINGS IN COURT OF FIRST INSTANCE WHEN FEDERAL QUESTIONS SOUGHT TO BE REVIEWED WERE RAISED. METHOD OF RAISING QUESTIONS AND HOW PASSED UPON.

The validity of Sec. 9 of the act in question under the Fourteenth Amendment to the Constitution of the United States was raised in Par. VI of the complaint in this case filed in the Circuit Court of Cook County (Abs. 6-7) and is quoted in the footnote.*

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* "VI. Section 9 of the Act provides that a retailer need not remit any part of a tax collected by him to the extent that he remits the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property. In this the Act violates Sec. 20 of Article IV of the constitution of the State of Illinois in that it makes a gift of public funds for a private purpose and it violates Sec. 2 of Article II of the constitution of the State of Illinois and the Fourteenth Amendment to the constitution of the United States in that it takes property without due process of law; And it violates Section 23 of Article IV of the constitution of the State of Illinois in that it releases or extinguishes the indebtedness, liability, and obligations of corporations and individuals to the State of Illinois; And it violates Section 22 of Article IV of the constitution of the State of Illinois and the Fourteenth Amendment to the constitution of the United States in that it is a special law and it grants special privileges, franchises and immunities to corporations, associations and individuals."

The validity of Sec. 9 of the act in question was argued at p. 3 of appellant's brief in the Illinois Supreme Court which has been certified here with the record (R. 9) and is quoted in the footnote.*

The validity of Sec. 3 of the act in question under the Fourteenth Amendment to the Constitution of the United States was raised in Par. IX of the complaint in this case filed in the Circuit Court of Cook County (Abs. 15) and is quoted in the footnote.**

The validity of Sec. 9 of the Act in question was argued at p. 28 and p. 34 of appellant's brief in the Illinois Supreme Court (R. 9) quoted in the footnote.***

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* "Sec. 9 of the act allows a retailer collecting the use tax for the state to retain it as his own and the tax never reaches the state treasury. As a consequence non-taxpayers are the sole beneficiaries of the taxes paid by taxpayers. It is a violation of the due process of law provisions of the state and federal constitutions to take a citizen's money from him under the guise of taxes and then refund it to one who was not the taxpayer."

** "IX. The act discriminates in favor of purchasers at retail from persons engaged in service occupations in that such purchasers are not required to pay the tax imposed by the act for the reason that Sec. 3 of the act provides that if the seller of tangible personal property would not be taxable under the Retailers' Occupation Tax Act then the tax imposed by this act shall not apply to the use of such property. In this the act is discriminatory in violation of the Fourteenth Amendment to the United States Constitution, and Section 2 of Article II and Section 22 of Article IV of the Illinois Constitution; and is not uniform as to the class upon which it operates in violation of Section 1 of Article IX of the Illinois Constitution."

*** "We maintain that the imposition of the tax upon the class in question has no reasonable basis and clearly violates the uniformity clause (Sec. 1, Art. IX), Sec. 2, Art. II and Sec. 22, Art. IV of the Illinois Constitution and the Fourteenth Amendment to the United States Constitution."

"We submit that the Use Tax Act for the reasons given, is discriminatory and not uniform as to class; under the decisions cited, it violates the uniformity clause of Sec. 1, Art. IX, Sec. 2, Art. II and Sec. 22, Art. IV of the Illinois Constitution and the Fourteenth Amendment to the United States Constitution."

No assignment of error was filed in the Illinois Supreme Court for the reason that Illinois Supreme Court rules dispense with the filing of an assignment of errors either in the record (Sec. 101.36 (2) (a) Ch. 110, p. 536 Vol. II, Illinois Revised Statutes, 1955, "no assignment of errors or cross errors is necessary") or in the briefs (Sec. 101.39 (1) Ch. 110, p. 537 Vol. II, Illinois Revised Statutes, 1955, "Neither an assignment or statement of errors is necessary"). In Illinois Supreme Court practice an appeal is not a new proceeding but is a continuation of the proceeding in the court from which the appeal was taker (*Swain* v. *Hoberg*, 380 Ill. 442-446, 1942.) Until January 1, 1956 the concluding subdivision of the statement of the case of a brief was required to state the errors relied upon for reversal; but that was regarded as nonjurisdictional. (*Swain* v. *Hoberg*, 380 Ill. 442-446, 1942.) This appeal was taken to the Illinois Supreme Court by filing notice of appeal April 11, 1956. Since January 1, 1956, the provision requiring a brief to state the errors relied upon for reversal has been dispensed with. (Sec. 101.39 Ch. 120, p. 537 Vol. II, Illinois Revised Statutes, 1955.) In Illinois Supreme Court practice an appellant can raise any question clearly appearing to have been raised in his brief. (*Swain* v. *Hoberg*, 380 Ill. 442-446, 1942.)

The Circuit Court of Cook County, in the final decree from which the appeal was taken to the Illinois Supreme Court, sustained defendant's motion to strike and dismiss, found that the act in question "does not violate the Constitution of the State of Illinois or the Constitution of the United States" (Abs. 24) and dismissed plaintiff's suit. (Abs. 24.)

The opinion of the Illinois Supreme Court (R. 38) recited

the issue as to the validity of Sec. 9 of the act in question as quoted in the footnote.*

and held it constitutional (R. 38) as quoted in the footnote.**

The opinion of the Illinois Supreme Court recited the issue as to the validity of Sec. 3 of the act in question (R. 39-40) as quoted in the footnote;***

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* "The act requires the Illinois retailer to collect the use tax upon the sales he makes. It does not require him to remit that tax to the State, however, to the extent that he remits the retailers' occupation tax with respect to the sale of the same property. (Section 9) Plaintiff also contends that this set-off provision provides for a gift of public funds to private individuals, permits the commutation of taxes and provides for the cancellation of a debt due to the state, all in violation of the constitution. Const. Art. IX, Secs. 6 and 7; Art. IV, Sec. 23."

** "It is true that the scheme of this tax is more complex than that of a use tax that falls only on out of state purchases. But its purpose and its results are those of the typical use tax, and the formal differences in the method by which those purposes are accomplished do not affect the validity of the statute.

It is not intended that both taxes shall reach the treasury with respect to a single transaction. It is intended and provided that one tax, and only one, shall reach the State Treasury with respect to each purchase of property for use within the state, whether or not the purchase is made within Illinois."

*** "The exemption provisions of the act are also attacked. The use tax act falls on 'the privilege of using in this state tangible personal property purchased at retail—from a retailer.' The basic terms employed in the Use Tax Act are those used in the Retailers' Occupation Tax Act and, except in the instance just discussed, they are so defined as to make the scope of the two acts the same. In addition, Section 3 of the Use Tax Act contains the following provision designed to limit the impact of the tax to those transactions that would measure a tax under the Retailers' Occupation Tax Act: 'If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all the elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this state.'"

and held it constitutional (R. 40) as quoted in the footnote.*

III.

THE FEDERAL QUESTIONS ARE SUBSTANTIAL

A.

THE NATURE OF THE CASE AND THE RULINGS OF THE COURT BRING THE CASE WITHIN THE JURISDICTIONAL PROVISIONS RELIED ON.

We have previously shown that the validity of an Illinois statute was drawn in issue in the Circuit Court of Cook County and in the Illinois Supreme Court on the grounds of its being repugnant to the Fourteenth Amendment to the United States Constitution. Both courts sustained the validity of the statute, which therefore gives this court jurisdiction. (*James Stewart and Co.* v. *Sadrakula*, 333 U.S. 203, 1947; *Reconstruction Finance Corp.* v. *Beaver County*, 328 U.S. 204, 1946.)

The validity of Sections 9 and 3 of the act in question under the Fourteenth Amendment to the Constitution of the United States was not mentioned in the opinion of the Illinois Supreme Court, although the validity of the two sections under the Fourteenth Amendment was drawn in issue in both the trial court and in the Supreme Court and is therefore subject to review in this appeal. Mere failure of the opinion of the highest court of a state to refer to an issue raised in that court under the United States Constitution will not defeat the jurisdiction of this court where the state court's judgment of affirmance necessarily

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* "But the tax before us does not stand alone. The purpose of the use tax is to protect the base of the retailers' tax and the classification adopted is reasonably directed to this end."

denied the federal rights claimed by the appellant. (*Chicago B. and Q. R. Co.* v. *Chicago*, 166 U.S. 226-231-232, 1896.) So long as the federal question was properly raised in the state court, silence in the opinion of the court as to the presence of the issue will not preclude the appellant from raising it here. (*Erie Railroad* v. *Purdy*, 185 U.S. 226-231-232, 1901.) The fact that the highest court of a state purports to rest its decision largely on state law does not eliminate the duty of this court to consider an issue to the extent that it arises under federal law; and it is for this court to determine whether the federal issue was necessarily, although only impliedly, adjudicated by the state court. (*Grand River Dam Authority* v. *Grand-Hydro*, 335 U.S. 359-369-370, 1948.)

Here the validity of the sections of the act in question was challenged both under the state constitution and the federal constitution so that the Illinois Supreme Court could not have rested its decision upon state grounds only. It must have based its decision upon federal grounds as well as state grounds in order to hold the act in question constitutional and the jurisdiction of this court is therefore plain. (*Abie State Bank* v. *Bryan*, 282 U.S. 765-773, 1931.)

B.

THE FEDERAL QUESTION RELATING TO THE VALIDITY OF SECTION 9 OF THE USE TAX ACT IS SUBSTANTIAL.

As previously shown where a purchase is made from a seller without a certificate of registration under the retailers' act or use tax act, the purchaser pays the use tax directly to the Department of Revenue. This occurs only in case of a purchase made outside Illinois from a seller without an Illinois use tax certificate of registration. It could not occur in case of an Illinois sale because all Illinois retailers must have certificates under the retailers' act.

In all cases where a purchase is made from a retailer having a certificate of registration under the retailers' act or use tax act, the tax is paid by the purchaser to the retailer. (Sec. 439.3 Ch. 120, p. 817 Vol. II, Illinois Revised Statutes, 1955.) The act makes it unlawful for a retailer to assume or absorb the tax himself. (Sec. 439.7 Ch. 120, p. 818 Vol. II, Illinois Revised Statutes, 1950.) He is thus compelled to collect the use tax in case of every sale where the tax is due.

We have already shown that where a purchase is made in Illinois, there is also a retailer's tax upon the same transaction. Sec. 9 of the use tax act, the validity of which is drawn in issue here, while requiring a retailer to remit the use tax to the Department of Revenue, then further provides that "a retailer need not remit that part of any tax collected by him to the extent that he is required to remit and does remit the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property." (Sec. 439.9 Ch. 120, p. 818 Vol. II, Illinois Revised Statutes, 1955.) Since a non-resident retailer without a place of business in Illinois who voluntarily registers under the use tax act (Sec. 439.6 Ch. 120, p. 818 Vol. II, Illinois Revised Statutes, 1955) is not subject to the Illinois retailers' act as to sales without the state, no tax is due from him under the retailers' act and he cannot avail himself of the set-off provisions of Sec. 9. He must pay the full amount of use taxes collected to the Department of Revenue. Thus, only a retailer transacting business in Illinois is able to avail himself of the set-off provisions of Sec. 9.

This court has sustained use tax acts of other states. (*Southern Pacific Co.* v. *Gallagher*, 306 U.S. 167, 1939 California; *Nelson* v. *Sears Roebuck and Co.*, 312 U.S. 359, 1941, Iowa; *Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 1937, Washington.) However none of the use tax acts of other states have the unique provision found in the Illinois act

for the retention of the use tax by a retailer. Hence none of the cases just cited involved the issue presented here.

The Illinois retailers' tax is not a sales tax upon purchasers, but an occupation tax upon retailers. (*Automatic Voting Machine Corp.* v. *Daley*, 409 Ill. 438-447, 1951.) Consequently retailers are not agents of the state to collect their own occupation tax from purchasers. (*People's Drug Shop* v. *Moysey*, 384 Ill. 283, 1943.) The sole duty of paying that tax rests upon retailers (*ibid.*). Nothing in either the retailers' act or the use tax act abates this primary obligation of a retailer to pay his own tax. *It is important to bear in mind that under Section 9 it is not the use tax which a retailer pays to the Department of Revenue with an abatement given of his own retailers' tax. He pays his own retailers' tax upon which there is no abatement and retains the use tax as his own.* As a consequence the use tax so far as Illinois purchases are concerned is levied for the sole benefit of Illinois retailers. They collect it and they retain it as of right. The tax becomes their property and does not enter into the state treasury.

So far as Illinois purcheses are concerned the act in question bears no pretense of a levy for governmental purposes. It is a direct levy for the sole benefit of a group composing the state's retailers. It is not paid into the public treasury where taxes customarily go. A tax in the general understanding of the term signifies an exaction for the support of government (*United States* v. *Butler*, 297 U.S. 1-61, 1935). A tax has never been thought to mean an appropriation from one group for the benefit of another (*ibid.*).

It has long been the interpretation of the Fourteenth Amendment that the appropriation by a state of taxes for a private purpose is a taking of property without due process of law. (*Citizens Savings and Loan Asso.* v. *Topeka*, 20 Wall. 655, 1875; *Green* v. *Frazier*, 253 U.S. 233, 1920;

City of Parkersburg v. *Brown*, 106 U.S. 487, 1883; *Thompson* v. *Consolidated Gas Co.*, 300 U.S. 55, 1939) and that a state may not impose taxes in aid of private enterprise (*Citizens Savings and Loan Asso.* v. *Topeka*, 20 Wall. 655, 1875; *City of Parkersburg* v. *Brown*, 106 U.S. 487, 1883; *Cole* v. *La Grange*, 113 U.S. 1, 1885; *Green* v. *Frazier*, 253 U.S. 233, 1920).

This is not a case where a tax upon one class may indirectly benefit another, as for example, a tax upon butter substitutes which burdened dealers in butter substitutes in their competition with dealers in butter (*A. Magnano Co.* v. *Hamilton*, 292 U.S. 40, 1934). The tax in that case was an ordinary excise which went into the state treasury. There the court said (p. 43), "*That the tax is for a public purpose is equally clear, since that requirement has regard to the use which is to be made of the revenue derived from the tax*, and not to any ulterior motive or purpose which may have influenced the legislature in passing the act." (Italics supplied.) In the instant case the tax is for the direct benefit of Illinois retailers who collect it. Not a penny of it is for the public benefit.

To be distinguished also is a payroll tax for unemployment compensation held to be for public purpose (*Carmichael* v. *Southern Coal and Coke Co.*, 301 U.S. 495, 1937). There the social and economic consequences of unemployment clearly established a tax for the purpose of alleviating such consequences as one for a public purpose.

In the instant case the appropriation of the tax to Illinois retailers does not bear the most remote appearance of a public purpose. If such an appropriation be for a public purpose then almost any conceivable appropriation of taxes from one class of taxpayers for the benefit of another class would be for a public purpose for no other reason than the class collecting the tax happened to be taxpayers in a particular occupation.

Upon that method of reasoning a tax might be levied upon tenants to be collected and retained by landlords for the reason that they are in the business of renting real estate and pay real estate taxes. So, too, a tax might be levied upon users of gas and electricity to be collected and retained by utility companies because they are in the business of selling gas and electricity and pay utility taxes.

C.

THE FEDERAL QUESTION RELATING TO THE VALIDITY OF SECTION 3 OF THE USE TAX ACT IS SUBSTANTIAL.

We have already shown that the retailers' tax is upon the occupation of selling tangible personal property at retail (Sec. 441, Ch. 120, p. 821, Vol. II, Illinois Revised Statutes, 1955). In construing the retailers' act the Illinois Supreme Court has held that where the principal occupation of a seller is the rendering of a service rather than the sale of personal property, the seller's occupation is not subject to the tax imposed by that act (*Mahon* v. *Nudelman*, 377 Ill. 331-335, 1941). That act does not impose a tax, even though a sale of tangible personal property is made, where the sale is an incident to the practice of a profession (*ibid.*) or the performance of skill or artistic ability (*ibid.*). The so-called "service occupation" rule has resulted in the exclusion of a wide variety of occupations from the tax imposed by the retailers' act.*

*To name a few of the classes excluded by the Illinois Supreme Court under the service occupation theory are sales of medicine and bandages by a hospital (*Mallen Co.* v. *Department of Finance*, 372 Ill. 598, 1940), sales of meals by a club to its members (*Swithiod Singing Club* v. *McKibbin*, 381 Ill. 194, 1942), the business of making blueprints (*Burgess Co.* v. *Ames*, 359 Ill. 427, 1935), and electrotypes (*A.B.C. Electrotype Co.* v. *Ames*, 364 Ill. 360, 1936), repairing shoes (*Revzan* v. *Nudelman*, 370 Ill. 180, 1938), remodeling fur coats (*Mahon* v. *Nudelman*, 377 Ill. 331, 1941), manufacturing machine tools made to order, (*Ingersoll* v. *Department of Revenue*, 405 Ill. 367, 1950) and the selling of eyeglasses by optometrists (*Babcock* v. *Nudelman*, 367 Ill. 626, 1937). There are many others in the class of service occupations.

Sec. 3 of the use tax act (Sec. 439.3 Ch. 120, p. 817 Vol. II Illinois Revised Statutes, 1955) provides that, "If the seller of tangible personal property for use would not be taxable under the Retailer's Occupation Tax Act despite all elements of a sale occurring in this state, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this state."

Since the so-called service occupations are not subject to the retailers' tax, the result of the foregoing exemption given by Sec. 3 is that no purchaser of tangible personal property from a seller in a service occupation is subject to the use tax. As a consequence a member of a club pays no use tax for his lunch. His secretary who buys her lunch at a restaurant pays a use tax. One man buys a tailor made suit and pays no use tax. Another buys a ready made suit and pays a use tax. Both classes of users enjoy the identical privilege. These discriminations may be carried out to each of the many service occupations.

There is no reasonable basis for any of the foregoing classifications. The Illinois Supreme Court opinion justified the exemption given by Sec. 3 solely upon the basis that the use tax act is complementary to the retailers' act. (R. 40.)*

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*In its opinion the court said, "While the distinctions that have been drawn are admitted to be relevant to an occupation tax upon retailers, they are said to be irrelevant, and therefore arbitrary and discriminatory, when included in a tax that falls upon the privilege of using property purchased at retail.

The argument would, we think, be persuasive if the use tax stood alone, for so far as use by the purchaser is concerned there is no distinction between a tailormade suit of clothes, for example, and one purchased at retail. But the tax before us does not stand alone. It is designed to complement and to protect the tax imposed upon the occupation of selling at retail, and the validity of its exemptions is to be determined in the light of that purpose. . . . The purpose of the use tax is to protect the base of the retailers' tax and the classification adopted is reasonably directed to this end."

In holding that the two acts are complementary, the court reached a conclusion exactly the opposite of what it had reached in its first opinion in this case when it held that the act in question was unconstitutional. (R. 21-22.)*

We maintain that the Illinois use tax is not complementary to the retailers' act as use taxes are in other states. Hence there is no reasonable basis for Sec. 3 of the act in question to grant exemptions in all cases where the retailers' tax act does not apply.

We have already shown that in all other states having use taxes both (1) a sales or retailers' tax and (2) a use tax are not due upon domestic sales. Either an exemption from the use tax is given (as in most states) or, only one of the taxes is payable as in some (Appendix E). In no state other than Illinois are both taxes due upon domestic sales.

The word "complement" means that which completes (The American College Dictionary) or supplies a deficiency (Webster's Collegiate Dictionary). In discussing the general nature of sales taxes and use taxes in other states this court has said that they "are complementary but serve very different purposes." (*Miller Bros. v. Maryland*, 347 U.S. 340-343, 1954.) *The sales tax* has the effect of increasing the cost to the consumer in the taxing state. (*Ibid.*) The *use tax* usually appears as a support to the sales tax. This it does in two respects. (1) One is the protection of the State's revenues by taking away from inhabitants the

*In its first opinion the court said, "The defendants argue that the complementary character of the act justifies its classifications. We are not impressed with this argument and find that this tax is not in fact a complement to the retailers' tax. . . . Unlike use taxes enacted in other states, a user in Illinois is not exempt from taxation by the mere fact that a retailers' occupation tax is also paid on the same transaction. Under the Illinois act, the user must pay the tax, but this tax may be retained by the retailer who has paid a retailers' occupation tax."

advantages of resorting to untaxed out-of-state purchases. (2) The other is the protection of local merchants against out-of-state competition by those able by lower tax burdens to offer lower prices. (*Ibid.*)

No use tax act of any other state that had been sustained by this court imposes the tax upon domestic purchases as does the Illinois act. (*Henneford* v. *Silas Mason Co.*, 300 U.S. 577, Washington, 1937; *Southern Pacific Co.* v. *Gallagher*, 306 U.S. 167, California, 1939; *Nelson* v. *Sears Roebuck and Co.*, Iowa, 1941.) These cases stress that the effect of such a use tax is to help local retailers compete upon terms of equality with retailers outside the state (*Henneford* v. *Silas Mason Co.*, p. 581); that property sold or used is taxed but once (*Southern Pacific Co.* v. *Gallagher, supra*, p. 364) and that the amount exacted from the sales tax payer and the use tax payer is at the same rate (*Southern Pacific Co.* v. *Gallagher, supra*, p. 172; *Nelson* v. *Sears Roebuck and Co., supra*, p. 364, "As we have seen, the use tax and the sales tax are complementary. Sales made wholly within Iowa carry the same burden as these mail order sales. A tax or other burden obviously does not discriminate against interstate commerce where quality is its theme.")

Tested by the foregoing principles the Illinois use tax act is not complementary to the retailers' act as are use tax acts of other states to their sales or retailers' acts. It does not "complete" or "supply the deficiency" of the retailers' tax for any one of the three following reasons:

(1) It does not merely plug the gap by taxing only out of state purchases that have escaped the Illinois Retailers' Act. It introduces a new tax upon domestic transactions that exists side by side with the retailers' tax. Such a tax upon domestic transactions is not a deterrent to an Illinois resident making purchases outside the state. Neither does it protect local retailers from out of state competition. A

use tax only upon out of state purchases would have accomplished both of those objects.

(2) We have previously shown that the use tax upon domestic transactions is collected and kept by Illinois retailers. It is imposed primarily for their benefit and not for the benefit of the state. It is inconceivable that a use tax levied for such a purpose "completes" or "makes perfect" the retailers' tax. We previously quoted in a footnote a portion of the first opinion of the Illinois Supreme Court (which held the act unconstitutional) that the retention of the use tax by retailers resulted in the two acts not being complementary. This was ignored by the court in its second opinion.

(3) In construing the use tax act and the retailers' act the Illinois Supreme Court in this case found that the rate of the use tax is not always the same as the retailers' tax. (R. 39.)* Despite the finding by the court shown in the footnote that the two acts are not complementary because the rate of tax is not the same, the court later in its opinion ignored

*"There is, however, one respect in which the use tax does not precisely complement the retailers' occupation tax. The former tax is based upon 'selling price,' the latter on 'gross receipts' from sales. 'Selling price' is defined in both statutes to mean the consideration for a sale valued in money whether received or paid in money or otherwise, 'including cash, credits, service and property of every kind or nature' . . . (Ill. Rev. Stat., 1955, chap. 120, pars. 439.2, 440.) By an amendment in 1955, however, the definition of 'gross receipts' in the Retailers' Occupation Tax Act was amended so that it 'means the total selling price, . . . excluding therefrom any amount allowed as credit for tangible personal property taken in trade.' (Ill. Rev. Stat., 1955, chap. 120, par. 440.) The result of this discrepancy in definitions is that in cases in which property is received in trade as a part of the purchase price, the tax due may not be the same under the two statutes. For example, if a new car is purchased for $3000 and the buyer's old one is received in trade at $1000, the use tax will be $75. Under the Retailers' Occupation Tax Act, however, the value of the old car would not be included in the 'gross receipts' on which the tax is computed, so that the tax would be $50."

that finding and inconsistently concluded that the two acts are complementary without referring to its previous finding. We submit that two such taxes as these cannot be complementary when both are not at the same rate.

An exemption in the revenue act of a state making a classification with no apparent, substantial, or fair relation to the object of the act or public interest, violates the equal protection clause of the Fourteenth Amendment. (*Colgate* v. *Harvey*, 296 U.S. 404, 1935.)

We submit that, for the reasons we have given, Sec. 3 of the act in question falls within the condemnation of this court in the case just cited. The use tax act not being complementary to the retailers' act, there is no reasonable basis to provide for the same exemptions in the former as in the latter. It is reasonable for a state to impose a tax upon the occupation of selling tangible personal property at retail and exclude service occupations from the tax. It is altogether unreasonable and arbitrary to impose a tax *upon the use* of tangible personal property purchased at retail and exempt purchasers who buy from sellers for no other reason than they happen to buy from sellers who are not subject to the retailers' tax. There is no apparent, substantial or fair relation of such classifications to the object of the act or the public interest.

D.

IF EITHER SECTION 9 OR SECTION 3 BE HELD UNCONSTITUTIONAL, THEN THE ENTIRE ACT MUST FALL.

Where the sections of an act are so mutually connected and dependent on each other as conditions or considerations for each other as to warrant the belief that the legislature intended them as a whole and that if all could not be carried into effect the legislature would not pass the residue independently, and some parts are unconstitutional, all of the provisions of the act thus dependent must fall. (*Berea College* v. *Kentucky*, 211 U.S. 45-55, 1908.)

Tested by the foregoing rule, the entire Illinois use tax act must fall if either Sec. 9 or Sec. 3 be unconstitutional. Sec. 9 is one of the basic features of the act. The Illinois legislature definitely intended that the use tax collected by Illinois retailers should not enter the state treasury. If Sec. 9 alone should be held invalid, with the balance of the act standing, then all collections of use taxes upon Illinois purchasers would be paid into the state treasury, a result the Illinois legislature never intended. Likewise, Sec. 3 is one of the basic features of the act in question. The elimination of the invalid provisions of that section without invalidating the entire act would mean that the tax would be imposed upon persons whom the legislature intended should not pay it.

It is therefore respectfully submitted that this court has jurisdiction of this appeal.

Respectfully submitted,

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APPENDIX A

COPY OF JUDGMENT APPEALED FROM

The following is a copy of the judgment of the Illinois Supreme Court appealed from. (R. 48):

UNITED STATES OF AMERICA

STATE OF ILLINOIS } ss.
SUPREME COURT }

AT A TERM OF THE SUPREME COURT, begun and held in Springfield, on Monday, the eleventh day of March in the year of our Lord, one thousand nine hundred and fifty-seven, within and for the State of Illinois.

Present: RAY I. KLINGBIEL, CHIEF JUSTICE

JUSTICE JOSEPH E. DAILY — JUSTICE WALTER V. SCHAEFER

JUSTICE GEORGE W. BRISTOW — JUSTICE HARRY B. HERSHEY

JUSTICE CHARLES H. DAVIS — JUSTICE BYRON O. HOUSE

LATHAM CASTLE, *Attorney General*

ROBERT G. MILEY, *Marshal*

Attest: MRS. EARLE BENJAMIN SEARCY, *Clerk*

BE IT REMEMBERED, that, to-wit: on the 20th day of March 1957, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

No. 34044

JOHN W. TURNER, JR.,

Appellant,

vs.

WARREN E. WRIGHT,
Treasurer of the State of Illinois

and

RICHARD J. LYONS,
Director of the Department of Revenue
of the State of Illinois,

Appellees,

Appeal from Circuit Court, Cook County 55 C 12059
Error to

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the decree aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

THEREFORE, it is considered by the Court that the decree of the Circuit Court of Cook County aforesaid, BE AFFIRMED IN ALL THINGS AND STAND IN FULL FORCE AND EFFECT, notwithstanding the said matter and things therein assigned for error.

I, MRS. EARLE BENJAMIN SEARCY, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing

is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said court this 24th day of May, 1957.

(SEAL)

/s/ MRS. EARLE BENJAMIN SEARCY, *Clerk*
Supreme Court of the State of Illinois.

APPENDIX B

FIRST OPINION OF ILLINOIS SUPREME COURT

Docket No. 34044—Agenda 42—May, 1956.

John W. Turner, Jr., Appellant, vs. Warren E. Wright, State Treasurer, *et al.*, Appellees.

Mr. Justice Davis delivered the opinion of the court:

This case comes to us on direct appeal from the order of the circuit court of Cook County dismissing plaintiff's complaint for a declaratory judgment and injunction against the enforcement of the Illinois Use Tax Act, (Ill. Rev. Stat. 1955, chap. 120, pars. 439.1-439.18,) and the 1955 amendment to section 4 of the Uniform Motor Vehicle Anti-Theft Act (Ill. Rev. Stat. 1955, chap. 95½, par. 77,) which made certain incidental but necessary changes as an enforcement aid to the Use Tax Act, on the ground that such enactments are unconstitutional.

The plaintiff, a citizen and taxpayer of Illinois, purchased a motor vehicle in Indiana on August 1, 1955, from a retail automobile dealer, and thereafter took possession of, and brought said vehicle into Illinois, where he used and operated it. By the terms of the Use Tax Act, he was required to pay a use tax to the Department of Revenue, which he did under protest. The case squarely questions whether the Illinois Use Tax Act contravenes the revenue provisions of the constitution of the State of Illinois, as well as other constitutional guarantees.

It is the contention of the plaintiff that the Use Tax Act violates the Illinois constitution and the fourteenth amendment to the United States constitution. *Amici curiae* urge that the use tax is not in fact a privilege tax, but rather that it is a property tax without uniformity and that the act unreasonably classifies persons, all in violation of section 1 of article IX and the fourteenth amendment.

The defendants, by the Attorney General, argue that the Illinois use tax is a nondiscriminatory tax, and that the act is not vague but is justified as being complementary to and a corollary of the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1955, chap. 120, pars. 440-453.) Defendants further contend that any discriminatory provision contained in the act is severable.

Before analyzing the specific constitutional objections raised, we believe it proper to examine generally the provisions of the Illinois Use Tax Act. The act imposes a tax upon the purchasers of all tangible personal property purchased at retail and not for the purpose of resale. The tax is at the rate of 2½ per cent of the selling price, and is imposed upon all purchasers whether they buy within or outside the State. If the taxpayer buys from a retailer licensed under the Retailers' Occupation Tax Act, the retailer is required to collect the tax and give the buyer a receipt. A nonresident retailer is entitled to obtain a permit from the Department of Revenue and collect and remit the tax. If a taxpayer purchases property from a retailer who is not required to file returns with the Department and does not pay the tax to the retailer, the taxpayer shall file a return and pay the tax directly to the Department of Revenue. However, if a particular seller, such as one engaged in a service occupation, would not be taxable under the Retailers' Occupation Tax Act if the sale had occurred in Illinois, then the tax imposed by the Use Tax Act does not apply. This is true except in the case of any person who is engaged in a business which is not subject to the tax imposed by the Retailers' Occupation Tax Act because of involving the sale of, or a contract to sell real estate, or a construction contract to improve real estate, but who, in the course of conducting such business, transfers tangible personal property to users or consumers in the finished form in which it was purchased, and which does not become

real estate. In such a transaction, if a separate charge is made for tangible personal property so transferred, the value of such property shall be the amount separately charged, or if no separate charge is made, the value of such property shall be its cost to the transferor, and such use of tangible personal property is subject to the use tax although it would not be subject to the retailers' occupation tax.

While under the act, if a single sale of tangible personal property takes place in Illinois, the use tax and retailers' Occupational tax are both due, the Use Tax Act provides that a retailer need not remit that part of any tax collected by him to the extent that he remits the tax imposed by the Retailers' Occupation Tax Act. The act further provides that when the taxpayer pays the tax directly to a retailer, the latter may refund the money if the property is later returned to the retailer; however, no such refund provision is given a taxpayer who, by the act, is required to pay the tax directly to the Department of Revenue.

We think it helpful to a decision of the question before us to consider the history and development of the revenue article of our constitution, as well as the Use Tax Act, which was enacted in an effort to obtain revenue within the proscriptions of State and Federal constitutions. Originally, general property taxes were the principal source of revenue in Illinois, and our first constitution provided "that the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of the property he or she has in his or her possession." (Const. of 1818, art. VIII, sec. 20.) With the adoption of the constitutions of 1848 and 1870, the property taxes were continued as the principal source of revenue and provided most of the revenue for State and local purposes. However, in the constitution of 1848, specific authority was granted to the General Assembly to impose taxes upon

occupations, franchises and privileges. This provision was carried over into section 1 of article IX of our present constitution, adopted in 1870, but was made subject to the limitation that such a tax could only be imposed "by general law, uniform as to the class upon which it operates." While franchise and privilege taxes have been used from time to time, the specific constitutional limitations upon the taxing power of the State were not considered by this court until 1932, following the enactment of a graduated income tax law. This court then stated that section 1 of article IX limited the taxing power of the General Assembly to "(1) property taxes on a valuation basis; (2) occupation taxes; and (3) franchise and privilege taxes." (*Bachrach* v. *Nelson*, 349 Ill. 579, at page 589.) Thereafter, the legislature enacted the present Retailers' Occupation Tax Act (Ill. Rev. Stat. 1955, chap. 120, pars. 440-453,) which imposed a tax upon the occupation of "selling tangible personal property to purchasers for use and consumption." The validity of this act was upheld in *Reif* v. *Barrett*, 355 Ill. 104, and thereafter the legislature no longer relied upon a property tax to provide funds for the various activities of the State. Since then tax revenues have been derived from the retailers' occupation tax and other occupational, franchise and privilege taxes imposed by the legislature. Winning, The Revenue System of Illinois, S.H.A. chap. 120, p. 1.

At the time of the enactment of the Retailers' Occupation Tax Act, the legislature had already levied an inheritance tax which was sustained as a privilege tax (*Magoun* v. *Illinois Trust & Savings Bank*, 170 U.S. 283; *Kochersperger* v. *Drake*, 167 Ill. 122,) and a motor vehicle tax which was sustained as a tax upon the privilege of operating a motor vehicle upon public highways. (*People* v. *Deep Rock Oil Corp.* 343 Ill. 388.) In 1941 the legislature also enacted the Cigarette Tax Act (Ill. Rev. Stat. 1955, chap.

120, pars. 453.1-453.30,) which imposed an occupation tax upon persons engaged in business as distributors of cigarettes. While these sources of revenue were not objectionable as being violative of the constitution of Illinois (cf. *Winter* v. *Barrett*, 352 Ill. 441; *Bachrach* v. *Nelson*, 349 Ill. 579,) the Illinois legislature was still limited by the commerce clause of the constitution of the United States, which prohibited a sales tax or retailers' occupation tax which, when imposed on a transaction, burdened interstate commerce. (*Norton Co.* v. *Department of Revenue*, 340 U.S. 534.) The Illinois retailers' occupation tax could be avoided by the purchase of tangible personal property outside the State for use within the State.

This problem was common throughout the States of the nation, and in order to encompass this source of revenue, legislative draftsmen formulated a so-called "use tax" to obviate the proscription of the commerce clause of the United States constitution, and such tax has been repeatedly upheld as a tax "not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end." (*Henneford* v. *Silas Mason Co.* 300 U.S. 577.) A logical result of this distinction was the enactment of use taxes in 28 States for the purpose of gathering in revenue from transactions beyond the constitutional scope of their particular sales or retailers' occupation tax acts. (CCH State Tax Guides.) We think it clear, as all parties seem to concede, that the dominant purpose of the act before us was to complement the valid Retailers' Occupation Tax Act and remove the buyer's temptation to order merchandise in other States in an effort to escape payment of the tax on local sales. (*Johnson* v. *Halpin*, 413 Ill. 257.) The Illinois Use Tax Act therefore appears to have its genesis in the same considerations that gave rise to other so-called "use tax" statutes. (*Miller Bros.* v. *State of Maryland*, 347 U.S. 340.) It now seems certain

that the tax before us is inoffensive to the commerce clause of the Federal constitution. *Nelson* v. *Sears, Roebuck & Co.* 312 U. S. 359.

No effort was made in Illinois to reach out-of-State purchases until the enactment of the Cigarette Use Tax Act in 1951. (Ill. Rev. Stat. 1955, chap. 120, pars. 453.31-453.67.) The constitutionality of this act was upheld in *Johnson* v. *Halpin,* 413 Ill. 257, and this decision led to the enactment of the present use-tax legislation. However, we made it clear when we struck down the motor vehicle use tax in *People ex rel. Schoon* v. *Carpentier,* 2 Ill.2d 468, that a tax may not comply with the constitution merely because the legislature designates it a use tax.

We think it clear that the tax before us is not a property tax, nor is it a franchise or occupation tax. It must be sustained, if at all, as a tax upon a privilege. As such it must be "uniform as to the class upon which it operates."

With this historical background in mind, we turn to the attacks upon this particular act. We are not concerned with its wisdom, purpose, or benefits; the question before us is whether it complies with the Illinois and Federal constitutions.

The plaintiff urges that the tax does not meet the uniformity requirement of the constitution and that it is discriminatory in that it is imposed on users of tangible personal property purchased from retailers, as defined in the act, but not on users of property purchased from others; that the act imposes a tax upon purchasers from those engaged in the building trades, but not upon purchasers from other service occupations; and that the act provides for refunds to certain taxpayers returning property to retailers licensed under the act, but not to taxpayers who buy from others. Defendants answer that these discriminations are justified because the act is complementary to the retailers' occupation tax.

We think there is merit in plaintiff's contentions. The present retailers' occupation tax is levied upon the "occupation" of selling tangible personal property at retail for use and consumption. Since it embraces all persons engaged in such "occupation," it is clearly uniform upon the class on which it operates. (*Reif* v. *Barrett,* 355 Ill. 104.) This court invalidated a prior Retailers' Occupation Tax Act, as discriminatory and lacking in uniformity, which for the purposes of that act, declared that " 'tangible personal property' does not mean or include farm products or farm produce sold by the producer thereof * * *." (*Winter* v. *Barrett,* 352 Ill. 441, 459.) This court, in construing the Retailers' Occupation Tax Act, has held that the tax is only upon the occupation of selling tangible personal property at retail for use and consumption, and therefore has held it inapplicable to persons engaged in service occupations. (*Burroughs Co.* v. *Hollingsworth,* 415 Ill. 202; *Material Service Corp.* v. *Hollingsworth,* 415 Ill. 284; *Ingersoll Milling Machine Co.* v. *Department of Revenue,* 405 Ill. 367; *Svithiod Singing Club.* v. *McKibbin,* 381 Ill. 194; *Mahon* v. *Nudelman,* 377 Ill. 331; *Babcock* v. *Nudelman,* 367 Ill. 626.) The fact that these sales and transactions are without the scope of the act does not render the Retailers' Occupation Tax Act discriminatory and nonuniform since it levies a tax upon the occupation of selling tangible personal property at retail for use and consumption, and the service occupations that are not taxed are not within that occupational classification.

In the Use Tax Act now before us, however, the incident of taxation is not the occupation but "the privilege of using tangible personal property in this State." Section 2 of the Use Tax Act defines "use" as the "exercise by any person of any right or power over tangible personal property incident to the ownership of that property." Section 3 of the act provides: "If the seller of tangible personal

property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this State." This provision creates a class of tangible personal property users who are exempt from tax by virtue of the fact that they purchased such property from a seller who is not liable for a retailers' occupation tax on the sale in question. Section 2 of the act, however, removes users of personal property purchased from building contractors from such classification and declares that users of such property are not within such exempt class and are subject to the tax. While the uniformity clause of the Illinois constitution does not prohibit a use tax having exemptions and classifications, it does proscribe exemptions and classifications which are discriminatory or without a reasonable basis. Since the incident of use taxation is the use of tangible personal property, we can see no justification for a classification which exempts from such tax all persons who use such property merely because their seller is not taxable under the Retailers' Occupation Tax Act. If the tax is upon the use, why should a person using a suit purchased at a retail store bear the burden of the tax, while his neighbor who wears a tailor-made suit be exempt therefrom? Similar questions could be posed in connection with the other occupations classed as service occupations under the Retailers' Occupation Tax Act. In all of these cases the incident of taxation, the "use," is identical. The exempt classification created has no relation to the use of the property, but rather is bottomed on whether the person selling to the exempt taxpayer would have been obligated to pay a tax under the Retailers' Occupation Tax Act, and even this classification does not apply uniformly since the building contractor is removed therefrom.

We have held that a statutory classification resting upon

substantial differences in kind, situation, or circumstance which is reasonably related to the legislative purpose does not offend the constitutional prohibition. (*Illinois Bell Telephone Co.* v. *Board of Review of Dept. of Labor*, 413 Ill. 37.) The uniformity required by section 1 of article IX of the Illinois constitution is that the classification must rest upon a reasonable basis and the legislation must apply uniformly to all members of the class. (*City of Chicago* v. *Willett Co.*, 1 Ill.2d 311.) The Use Tax Act fails to meet these requirements. However, the defendants argue that it is constitutional for the sole reason that it is designed to complement the valid Retailers' Occupation Tax Act and prevent the avoidance of the payment of that tax. In so arguing, they place great emphasis on our recent decision in *Johnson* v. *Halpin*, 413 Ill. 257, where we sustained the Cigarette Use Tax Act on that basis. We do not consider the *Johnson case* applicable. In that case, the tax was laid uniformly upon the entire class of cigarette users under the provisions of the act; no user was exempt; and the ultimate result was that the economic burden was laid upon all Illinois users in the same amount.

The classification which the defendants here attempt to justify is not dependent upon a difference or distinction inherent in the use of property which is the incident of taxation. The difference is one that was created by the legislature in the Retailers' Occupation Tax Act. However, what is a legitimate classification when the incident of taxation is the occupation, is not necessarily a reasonable classification when the incident of taxation is the use of property. In resolving a similar issue in *Giebelhausen* v. *Daley*, 407 Ill. 25, at page 37, this court stated: "The principle applicable to a proper classification of persons subject to a law must rest on some difference which has a reasonable and just relation to the act in respect to which the classification is proposed."

The defendants argue that the complementary character of the act justifies its classifications. We are not impressed with this argument, and find that this tax is not in fact a complement to the retailers' tax. The Use Tax Act does not complete or make perfect the Retailers' Occupation Tax Act, instead it exempts a substantial class of users from the tax if their purchase is from a seller who is not liable for a retailers' occupation tax. A purchaser of personal property from a building contractor may be subject to a use tax while the building contractor would not be subject to a retailers' occupation tax. On the other hand, purchasers from vendors engaged in other service occupations, indistinguishable in their nature from that of a building contractor, would be exempt from the use tax as well as the retailers' occupation tax. Unlike use taxes enacted in other States, a user in Illinois is not exempt from taxation by the mere fact that a retailers' occupation tax is also paid on the same transaction. Under the Illinois act, the user must pay the tax, but this tax may be retained by the retailer who has paid a retailers' occupation tax. Clearly, this lack of uniformity as to the class on which it operates prevents this tax from equalizing the tax burden of the local retailers. (Cf. *Henneford v. Silas Mason Co.* 300 U.S. 577, 81 L. ed. 814; *Nelson* v. *Sears, Roebuck & Co.* 312 U.S. 359, 85 L. ed. 888.) Accordingly, we hold that the Use Tax Act violates the uniformity provision of section 1 of article IX of the constitution of Illinois.

Defendants further argue that if the classifications contained in the act are unreasonable, the exemptions granted are severable, and the entire act need not fall. Regardless of the severability provision of the act, if we cannot say that the legislative body would have passed the enactment with the invalid portions eliminated, the entire statute must be held invalid. (*City of Chicago Heights* v. *Public Ser-*

vice Co. 408 Ill. 604.) In the case at bar, the attempt to complement the retailers' occupation tax is evident. To strike out the exemptions carved by the legislature would be to impose a tax upon users not intended to be included by the legislature, and would be, in effect, the imposition of a tax by this court. We consider the provisions of this act so mutually connected and dependent, as conditions, considerations, and compensations for each other, that the legislature intended them as a whole, and the entire act must fall. *Winter* v. *Barrett*, 352 Ill. 441.

The 1955 amendment to section IV of the Uniform Motor Vehicle Anti-Theft Act (Ill. Rev. Stat. 1955, chap. 95½, par. 77,) was enacted as a companion provision of the Use Tax Act. It provides that where an applicant seeks a certificate of title for a motor vehicle, he must exhibit a receipt to the Secretary of State evidencing the payment of the use tax due on account of the purchase. In view of our decision concerning the validity of the Use Tax Act, we likewise declare this amendment to be unconstitutional.

The brief of *amici curiae* earnestly urges that the use of personal property is not a "privilege" within the meaning of the Illinois constitution. This argument goes to the broad power of the legislature to enact use-tax legislation. Sections 1 and 2 of article IX of the Illinois constitution provide:

"§ 1. The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, inn-

keepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates.

"§ 2. The specification of the objects and subjects of taxation shall not deprive the general assembly of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this constitution."

While we do not determine whether the use of personal property is such privilege, yet, subject to constitutional limitations, we find no prohibition in the foregoing sections of the revenue article against the enactment of such legislation. *Johnson* v. *Halpin*, 413 Ill. 257.

Other constitutional violations are urged, but need not be considered in view of our conclusion that the act lacks uniformity as to the class on which it operates. The decree of the circuit court dismissing the complaint must be reversed and the cause remanded with directions to grant the relief prayed.

Reversed and remanded, with directions.

APPENDIX C

MAJORITY OPINION OF ILLINOIS SUPREME COURT FOLLOWED BY DISSENTING OPINION

Docket No. 34044—Agenda 36—January, 1957.

John W. Turner, Jr., Appellant, v. Warren T. Wright, State Treasurer, *et al.*, Appellees.

Mr. JUSTICE SCHAEFER delivered the opinion of the court:

The plaintiff, a resident of Illinois, bought an automobile in Indiana, brought it into Illinois and used it here. Under the terms of the Use Tax Act, (Ill. Rev. Stat. 1955, chap. 120, pars. 439.1-439.18,) a tax thereupon became due. He paid it under protest, and brought this action to secure a refund. The circuit court dismissed his complaint and he appeals.

The Use Tax Act was enacted in 1955. It imposes a tax "upon the privilege of using in this State tangible personal property purchased at retail . . . from a retailer." (Section 3.) It applies whether the property is purchased in Illinois or elsewhere. The term "use" is defined basically to mean the exercise "of any right or power over tangible personal property incident to the ownership of that property." (Section 2.) The use tax is imposed at the same rate as the tax under the Retailers' Occupation Tax Act, (Section 3; cf. Ill. Rev. Stat. 1955, chap. 120, par. 441.) It does not apply to out-of-State transactions that would not measure a tax under the Retailers' Occupation Tax Act if they occurred in Illinois, nor is it applicable to the use of property purchased outside of Illinois on which a sale or use tax has been paid to another State, to the extent of the tax so paid. (Section 3.) The tax is to be collected by the retailer, but to the extent that a retailer remits the tax imposed by the Retailers' Occupation Tax Act, he is not required to remit the tax imposed by the Use Tax Act. (Section 9.) An out-of-State retailer

may be licensed by the Department of Revenue to collect and remit the tax. (Section 6.) One who purchases from an out-of-State retailer who is not so licensed is required to pay the tax directly to the Department. (Section 10.) The act incorporates by reference many of the administrative provisions of the Retailers' Occupation Tax Act. (Section 12.)

The validity of the statute under the commerce clause of the Federal constitution is not challenged, but numerous other constitutional objections are advanced by the plaintiff and by *amici curiae* who were given permission to file a brief. The plaintiff concedes that the General Assembly has the power to pass a use tax, and directs his attack at specific provisions of the present act. *Amici curiae*, however, contend that the constitution of Illinois prohibits the passage of any general use tax. This is the most fundamental objection raised, and we consider it first.

The argument starts with the broad dictum of *Bachrach* v. *Nelson*, 349 Ill. 579, that the constitution restricts the taxing power of the General Assembly to (1) property taxes on an *ad valorem* basis, (2) occupation taxes and (3) franchise or privilege taxes. It is then pointed out that the present tax is obviously not a franchise or occupational tax, and that it cannot be sustained as a property tax because it is not levied on an *ad valorem* basis, or as a privilege tax because it does not involve conduct over which the General Assembly has "a special power of control."

The present tax purports to be a privilege tax, like the use taxes in effect in many other States. (129 A.L.R. 223; 153 A.L.R. 609.) Substantially the same argument that is made here was advanced against the Cigarette Use Tax Act in *Johnson* v. *Halpin*, 413 Ill. 257. The court there analyzed the pertinent decisions and rejected the argument, saying: "On the basis of the foregoing analysis, it is apparent that the concept of 'privilege' with reference to

the taxing power has not been limited in Illinois, or in other States, to conduct previously authorized by the legislature, or which the legislature could entirely abolish, or to benefits conferred by the State. For the right to use the streets and the highways, and the right to make *inter vivos* gifts which are effective at death, all of which have been sustained as taxable privileges in Illinois, were regarded as common rights open to all persons prior to legislative action thereon. Therefore, a taxable privilege may involve lawful rights and conduct enjoyed without previous legal authority, but over which the legislature has some power of control or classification. A tax upon such rights would be valid provided the classification were reasonable, and the statute provided for uniformity among the constituents of the class. *Harder's Storage Co.* v. *City of Chicago*, 235 Ill. 58." 413 Ill. at 270.

In the *Johnson case* the court pointed to an additional ground upon which the Cigarette Use Tax could be sustained, saying: "Moreover, the selection of this particular privilege upon which to levy a tax is both reasonable and proper, since it is designed to complement the valid Cigarette Tax Act, and prevent the avoidance of the payment of that tax." (413 Ill. at 271.) The same considerations support the present tax.

It has been authoritatively said that "[m]any years of litigation have not resolved the uncertainties and ambiguities in the nonproperty provisions of Sections 1 and 2" of article IX of the constitution. (Cushman, Proposed Revision of Article IX, 1952 Ill. Law Forum, 226, 237.) Section 2 provides: "The specification of the objects and subjects of taxation shall not deprive the general assembly of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this constitution." This provision of the revenue article of the constitution has received

varying interpretations. See, *e.g.*, *Illinois Central Railroad Co.* v. *County of McLean*, 17 Ill. 291; *People* v. *Worthington*, 21 Ill. 170; *Raymond* v. *Hartford Fire Insurance Co.* 196 Ill. 329; *Harder's Fire Proof Storage and Van Co.* v. *City of Chicago*, 235 Ill. 58; *Bachrach* v. *Nelson*, 349 Ill. 579; *Reif* v. *Barrett*, 355 Ill. 104; *Johnson* v. *Halpin*, 413 Ill. 257.

But the uncertainty that has persisted as to the precise scope of section 2 of article IX need not trouble us in this case. Use taxes were developed, as the plaintiff points out, to prevent evasion of the tax that applies when retail purchases are made within the State, and to protect the retail local merchant against diversion of his business to out-of-State sellers. Those are the purposes of the present tax. Such a protective tax can depend for its justification upon the tax that it supports. The principle is not new in our law. Upon this basis completed gifts *inter vivos* that are not subject to revocation have been included in the estate of the donor for inheritance tax purposes if they were made in contemplation of death. And the statute fixes a presumption that gifts made within two years of the donor's death were made in contemplation of it. (Ill. Rev. Stat. 1955, chap. 120, par. 375.) Such a provision has been regarded as necessary to protect the base of the inheritance tax. (See *Rosenthal* v. *People*, 211 Ill. 306; *In re Estate of Benton*, 234 Ill. 366; *People* v. *Danks*, 289 Ill. 542.) A supplemental tax so levied to protect an admittedly valid tax from evasion or avoidance is clearly, in our opinion, a tax that is "consistent with the principles of taxation fixed in this constitution." We hold, therefore, that the General Assembly is not without power to enact a use tax.

While the plaintiff concedes that the constitution does not prohibit the imposition of a complementary use tax, he argues that the present statute is invalid. He points to the fact that other States that have use taxes impose them

only upon the purchase of property outside the State for use within it, and he argues that the Illinois tax is not complementary because it falls upon purchases made within the State as well as upon those made outside, and thus introduces a new tax upon domestic transactions. The act requires the Illinois retailer to collect the use tax upon the sales he makes. It does not require him to remit that tax to the State, however, to the extent that he remits the retailers' occupation tax with respect to the sale of the same property. (Section 9.) Plaintiff also contends that this setoff provision provides for a gift of public funds to private individuals, permits the commutation of taxes and provides for the cancellation of a debt due to the State, all in violation of the constitution. Const., art. IX, secs. 6 and 7; art. IV, sec. 23.

The statute provides for a use tax that falls alike on those who purchase at retail within the State and those who purchase outside of it. That tax is to be collected by the Illinois retailer, but to the extent that he remits the tax due under the Retailers' Occupation Tax Act he is not required to remit the tax due under the Use Tax Act. The tacit assumption of the statute is that by this mechanism the tax advantage that was enjoyed by the buyer who purchased outside the State will be eliminated, without increasing the burden upon the buyer who purchases within the State. The accuracy of that assumption is not challenged. The Illinois retailer is required to remit one tax of 2½ per cent with respect to each sale within the State. That is the same tax that is levied with respect to each out-of-State purchase for use within the State. It is true that the scheme of this tax is more complex than that of a use tax that falls only on out-of-State purchases. But its purpose and its results are those of the typical use tax, and the formal differences in the method by which those purposes are accomplished do not affect the validity of the statute.

It is not intended that both taxes shall reach the treasury with respect to a single transaction. It is intended and provided that one tax, and only one, shall reach the State treasury with respect to each purchase of property for use within the State, whether or not the purchase is made within Illinois. To that end the statute provides that the use tax collected by the retailer does not constitute a debt owed by him to the State when he "is relieved of the duty of remitting such tax to the Department by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act upon his gross receipts from the same transaction." (Section 8.) Only if the way in which the two taxes are interrelated is ignored is it possible to say that there is here a gift of public funds, commutation of taxes, or the cancellation of a debt owing to the State. The method by which the two taxes are integrated may be cumbersome, but it is not unconstitutional.

There is, however, one respect in which the use tax does not precisely complement the retailers' occupation tax. The former tax is based upon "selling price," the latter on "gross receipts" from sales. "Selling price" is defined in both statutes to mean the consideration for a sale valued in money whether received or paid in money or otherwise, "including cash, credits, service and property of every kind or nature * * *." (Ill. Rev. Stat. 1955, chap. 120, pars. 439.2, 440.) By an amendment in 1955, however, the definition of "gross receipts" in the Retailers' Occupation Tax Act was amended so that it "means the total selling price * * *, excluding therefrom any amount allowed as credit for tangible personal property taken in trade." (Ill. Rev. Stat. 1955, chap. 120, par. 440.) The result of this discrepancy in definitions is that in cases in which property is received in trade as a part of the purchase price, the tax due may not be the same under the two statutes. For example, if a new car is purchased for $3000 and the buyer's old one is received in trade at $1000, the use tax

will be $75. Under the Retailers' Occupation Tax Act, however, the value of the old car would not be included in the "gross receipts" on which the tax is computed, so that the tax would be $50. "The retailer, however, is required to remit to the Department the full $75, because he is excused from remitting the use tax that he collects only to the extent that he remits the retailer's tax with respect to the same transaction." No discrimination between purchasers is involved in this situation, because each purchaser is required to pay the same amount as every other purchaser. And there is no unjust enrichment of the retailer, for he is required to remit to the Department the full amount that he has collected. That the two taxes are not precisely identical therefore deprives no one of any constitutional rights.

The exemption provisions of the act are also attacked. The use tax falls on "the privilege of using in this State tangible personal property purchased at retail . . . from a retailer." The basic terms employed in the Use Tax Act are those used in the Retailers' Occupation Tax Act and, except in the instance just discussed, they are so defined as to make the scope of the two acts the same. In addition, section 3 of the Use Tax Act contains the following provision designed to limit the impact of the tax to those transactions that would measure a tax under the Retailers' Occupation Tax Act: "If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this State."

There are actions that the retailers' tax does not reach, because although they involve the physical transfer of personal property at retail, the element of service is so pronounced that it has been thought to dominate the element

of sale. (See, *e.g.*, *Mahon* v. *Nudelman*, 377 Ill. 331; *Huston Brothers Co.* v. *McKibbin*, 386 Ill. 479.) The use tax also exempts these transactions, and plaintiff argues that because it does so it is unconstitutional. While the distinctions that have been drawn are admitted to be relevant to an occupation tax upon retailers, they are said to be irrelevant, and therefore arbitrary and discriminatory, when included in a tax that falls upon the privilege of using property purchased at retail.

The argument would, we think, be persuasive *if the use tax stood alone*, for so far as use by the purchaser is concerned there is no distinction between a tailormade suit of clothes, for example, and one purchased at retail. But the tax before us does not stand alone. *It is designed to complement and to protect the tax imposed upon the occupation of selling at retail, and the validity of its exemptions is to be determined in the light of that purpose.* The question here is not whether the legislature *is required* to shape the use tax that it imposes to conform to the tax upon retailers, but whether it *may constitutionally do so.* We think that it may. The purpose of the use tax is to protect the base of the retailers' tax and the classification adopted is reasonably directed to this end. Whether the General Assembly could go further and broaden the base of the use tax beyond the limits of the occupation tax upon retailers is not before us.

In addition to his general attack upon the exemption scheme of the use tax, the plaintiff also challenges one particular exemption. In 1955 the General Assembly amended the Retailers' Occupation Tax Act so that the tax would reach tangible personal property in a finished form that was transferred in connection with a sale of real estate or a building construction contract, but did not become a part of the real estate, such a bathtubs, stoves, refrigerators and the like. (Ill. Rev. Stat. 1955, chap. 120, par. 440.)

To correlate the two taxes, the Use Tax Act includes a provision, in substantially the same language, bringing these same transactions within the scope of the use tax. (Section 1.) It is argued that the inclusion of this provision makes an invalid subclassification among those engaged in service enterprises, and that this subclassification makes the statute invalid. The distinction that the provision draws appears to be, as the plaintiff says, between the sale of personal property in a finished form, as in the instances enumerated, and its sale in an unfinished form. We are unable to see wherein such a distinction is improper. In any case, so far as the use tax is concerned, this particular provision stands upon no different footing than the others that are designed to correlate the two statutes. If there is vice in the provision as it appears in the Retailers' Occupation Tax Act, the attack should be directed at that act, and not at the statute designed to complement it.

The title of the Use Tax Act is: "An Act in relation to a tax upon the *privilege of using tangible personal property* in this State, to make appropriations to the Department of Revenue and to the Secretary of State in connection therewith and to make certain incidental but necessary corollary changes as an enforcement aid in the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933, as amended, by amending Section 4 of said Uniform Motor Vehicle Anti-Theft Act." It is attacked under section 13 of article IV of the constitution on the grounds (1) that it includes two subjects, (2) that its title does not express the subject matter of the act and (3) that it introduces a new subject into the Uniform Motor Vehicle Anti-Theft Act. So far as we can ascertain, the validity of a title that describes the provisions of an independent piece of legislation and also expressly amends an existing act has not been passed on by this court. The adjustments necessary to fit a new statute into the existing legislative scheme have heretofore been made by companion bills. In the only case

that we are aware of that involved a statute in which a similar technique was used, (*Routt* v. *Barrett*, 396 Ill. 322,) the present question was not raised.

Section 13 of article IV provides: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed; and no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act." This requirement prevents logrolling, and by limiting the contents of a bill to a single subject it outlaws legislative "riders," and so protects the veto power of the Governor against encroachment. 1 Debates and Proceedings of Illinois Constitutional Convention, (1870) p. 536; *St. Louis* v. *Tiefel*, 42 Mo. 578; *Commonwealth V. Barnett*, 199 Pa. 161, 48 Atl. 976.

We think that it is clear that all of the provisions of the act deal with a single subject,—the imposition of a use tax,—which is clearly expressed in its title. Appropriations to enforce the act are germane to that subject. The amendment to section 4 of the Uniform Motor Vehicle Anti-Theft Act provides that the Secretary of State shall not issue a certificate of title for a motor vehicle unless the applicant furnishes a receipt showing that the use tax has been paid, or establishes that no tax is due. Such a provision is obviously relevant to the enforcement of the use tax.

But it is also argued that the Uniform Motor Vehicle Anti-Theft Act, as it stood before the amendment to section 4, dealt with a subject entirely unrelated to any tax, and that the amendment introduces into that act extraneous matter that is foreign to its title. The title of the Uniform Motor Vehicle Anti-Theft Act (Ill. Rev. Stat. 1955, chap. 95½,) is "An Act in relation to the prevention of the theft of

motor vehicles by requiring certificates of title for registered motor vehicles and the licensing of dealers in used motor vehicles, trailers, semi-trailers and parts thereof." The new provision introduced by the amendment relates to the issuance of certificates of title by the Secretary of State and so it falls within the title of the act. Evidence that the use tax has been paid or is not due will also show from whom the car was acquired and so will aid the Secretary of State in ascertaining that it was legitimately acquired. The legislative technique here used invites close scrutiny. It has an inherent potential that, if not closely confined, would trespass upon the objections of the constitutional provision. In this instance, however, the provision in question is germane both to the new statute and to the statute that is amended, and so it does not conflict with the constitution.

Plaintiff's remaining objections can be shortly stated and shortly disposed of. A purchaser who does not pay the tax to a retailer is required, under penalty, to file a return with the Department of Revenue. The statute does not prescribe the form of a return, and does not in so many words authorize the Department to do so, and plaintiff argues that it therefore violates the due process clause. There is little room for debate as to what is to be contained in a return under the act. The authority of the Department to administer the act is expressly stated in many of its provisions, and it is implicit throughout all of them. That authority is adequate to authorize the Department to prescribe a form of return.

Section 12 of the act incorporates, by reference to their numbers and to the subjects with which they deal, sixteen sections of another statute, but does not identify by title the statute that contains the sixteen sections. Plaintiff argues that the act is therefore fatally vague and indefinite. The argument is without merit because section 12 makes it

unmistakably clear, by capsule references to the matters dealt with in the incorporated sections, that those sections are in the Retailers' Occupation Tax Act. And even without the references to specific subjects, a reading of the statute as a whole would remove any reasonable doubt.

In our opinion the circuit court properly sustained the validity of the statute, and its decree is affirmed.

Decree affirmed.

Mr. JUSTICE DAVIS, dissenting:

I voice my dissent to what I believe to be an unprecedented opinion by the majority. My conclusion is neither predicated on the wisdom or folly of the legislation, nor on what the majority describes as its "cumbersome" methods, but rather is based on the conviction that the legislature has failed to enact a valid, uniform privilege tax within the limitations of the revenue article of our constitution. Const., art. IX, secs. 1 and 2.

If I interpret the decision correctly, the majority implicitly concede that the Use Tax Act, if it stood alone, would be unconstitutional for lack of uniformity, but find justification for this lack of uniformity in the legislature's purpose to protect the base of the retailers' tax. Indeed it appears that the majority's decision is based on the assertion that "a protective tax can depend for its justification upon the tax that it supports."

I can find nothing in the revenue article nor in our decisions to indicate that a general protective purpose will render a tax immune to constitutional objections. The majority point to the tax on gifts in contemplation of death as one enacted for the purpose of protecting the base of the State inheritance tax. But I know of no case, including those cited by the majority, which indicates that such a protective tax could be upheld regardless of its uniformity, or without being a tax upon a privilege. Thus, the majority

opinion holds that while the legislature could not constitutionally enact the present use tax standing alone, since it first enacted a valid retailers' tax, with classifications peculiar to that occupation, it may now protect that tax by enacting a use tax without regarding constitutional requirements. Under this pronouncement, if the retailers' tax were repealed or substantially changed, those who use property in Illinois would be subjected to a clearly non-uniform and discriminatory tax. Such an objection was sufficient to strike down the Motor Vehicle Use Tax Act in *People ex rel. Schoon* v. *Carpentier*, 2 Ill.2d 468, at 475-476, where we held: "It is contended that this tax is similar to that in the Cigarette Use Tax Act and that the act is valid as levying a complementary tax to that levied by the Retailers' Occupation Tax Act. Our decision in *Johnson* v. *Halpin*, 413 Ill. 257, is cited in support of this contention. That case can offer no such support as it is evident that there is a salient difference between the Motor Vehicle Use Tax Act and the Cigarette Use Tax Act. A review of the statutes will reveal that the former (by the Secretary's construction) provides for no general tax upon all users of motor vehicles in this State. If the Retailers' Occupation Tax Act were repealed or substantially changed those who bought motor vehicles from Illinois dealers would escape the burden of this use tax. However, as pointed out in *Johnson* v. *Halpin*, 413 Ill. 257, the cigarette use tax is a tax on the local use of cigarettes and in no way discriminates against purchasers who buy their cigarettes outside of the State, since they pay the same tax as purchasers from Illinois distributors."

Nor can the majority find precedent in *Johnson* v. *Halpin*, 413 Ill. 257, upholding the Cigarette Use Tax Act. In that case we pointed out that the operation of the act was uniform and nondiscriminatory among all users of cigarettes, and stated at page 270: "Therefore, a taxable privilege may involve lawful rights and conduct enjoyed

without previous legal authority, but over which the legislature has some power of control or classification. A tax upon such rights would be valid provided the classification were reasonable, and the statute provided for uniformity among the constituents of the class. *Harder's Storage Co.* v. *City of Chicago*, 235 Ill. 58." We also stated at page 271: "However, as a privilege tax it must still conform to the constitutional requirements of uniformity as to the class upon which it operates." That opinion further recited that the cigarette use tax was levied upon the privilege of using cigarettes in this State, a privilege which the State could control or abolish, and I believe that fact as well as the complementary nature of the act, persuaded the court to sustain the constitutionality of the enactment.

Section 1 of the revenue article requires that a privilege tax must be "uniform as to the class upon which it operates." (Const., art. IX, sec. 1.) The provisions of section 2 of article IX have never been thought to eliminate this requirement. In *Ohio Oil Co.* v. *Wright*, 386 Ill. 206, 220, we stated: "We have held that these two provisions do not prevent the legislature from placing a tax on some other business or occupation than that specifically enumerated in section 1. (*Winter* v. *Barrett*, 352 Ill. 441; *Bachrach* v. *Nelson*, 349 Ill. 579; *Bessette* v. *People*, 193 Ill. 334.) However, such tax must be uniform as to the class upon which it operates, as is expressly provided by the constitution. A tax upon the occupation of producing oil is just as logical and valid a classification as is the occupation of engaging in the retail sale of tangible personal property for use or consumption, but like that tax it must operate uniformly upon a class. The designation of the persons composing a class may not be arbitrary or capricious, and uniformity may be violated by including those in fact not within the class, (*Banghart* v. *Walsh*, 339 Ill. 132; *Wedesweiler* v. *Brundage*, 297 Ill. 228; *Scully* v. *Hallihan*, 365 Ill. 185; *Svithiod Singing Club* v. *McKibbin*,

381 Ill. 194,) as well as by excluding those properly within it. *Lippman* v. *People*, 175 Ill. 101; *Winter V. Barrett*, 352 Ill. 441; *City of Chicago* v. *Ames*, 365 Ill. 529."

But the majority has now announced that the legislature may disregard uniformity and all other constitutional limitations provided the tax has the purpose of protecting another tax. The scope of this newly declared legislative taxing power is far beyond the constitutional proscriptions heretofore recognized.

The majority announced a further dangerous doctrine in sloughing off plaintiff's objection to the subclassification of the sale of personal property in connection with sales of real estate or building contracts. It stated that "If there is vice in the provision as it appears in the Retailers' Occupation Tax Act, the attack should be directed at that act, and not at the statute designed to complement it." Thus, a taxpayer is denied the right to constitutionally attack a void requirement of a complementary act, when the principal statute contains a similar invalid provision. This is, to the best of my knowledge, the first pronouncement by this court of this novel legal principle, which I regard as voliative of the constitutional rights of the plaintiff.

While sustaining the use tax because of its complementary character, the majority permit that tax to actually raise the base of the retailers' tax. The retailers' tax base is on "gross receipts" which excludes credit given for property taken in trade. The use-tax base is the selling price which disregards the value of such "trade-ins." Under the majority interpretation, the use tax increases the tax on all "trade-in" transactions, while not affecting the retailers' tax on "non-trade-in" transactions. This result obtains since the retailer is excused from remitting the use tax that he collects only to the extent that he remits the retailers' tax with respect to the same transaction. Thus, retailers will be

required to pay a tax based on the full value of the article sold, without excluding therefrom the value of any merchandise "traded in." The majority ignores the fact that, with respect to the tax increase on these transactions, the tax is not complementary but is entirely new.

The effect of the majority decision seems to be that once a tax is enacted for the general purpose of protecting a prior tax the subsequent tax (1) need not meet constitutional limitations, (2) cannot be constitutionally attacked if it complements similar provisions of the prior act, and (3) can go further than protection and can create an entirely new tax.

While the purpose of the use tax may be desirable, it can be justified only as a tax on a privilege; and it must therefore be uniform as to the class on which it operates. I am convinced that the classifications and exemptions of the Use Tax Act do not comply with the requirement of uniformity (*City of Chicago* v. *Willett Co.* 1 Ill.2d 311; *Johnson* v. *Halpin,* 413 Ill. 257; *Winter* v. *Barrett,* 352 Ill. 441;) and that it must stand or fall on its own merits. *People ex rel. Schoon* v. *Carpentier,* 2 Ill.2d 468.

I am mindful of the limitations of our revenue article, and the ever increasing monetary needs of government, but the exigencies of the situation offer no reason for this court to approve this legislation. While, with some misgivings, I concede that this is a tax upon a privilege within the meaning of the revenue article, I must dissent from the doctrine that a complementary or protective tax is exempt from the provisions of our basic charter. The majority decision has effectively removed many of the basic constitutional limitations on the taxing power. If this is to be done, it should be by a well considered constitutional amendment and not by fiat of this court.

APPENDIX D

PERTINENT PROVISIONS OF ILLINOIS USE TAX ACT

Sec. 3 is as follows:

"Sec. 3. A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail on and after August 1, 1955, from a retailer. Until and including June 30, 1957, such tax is at the rate of 2½% of the selling price of such property; and after June 30, 1957, at the rate of 2% of such selling price.

The tax hereby imposed shall be collected from the purchaser by a retailer maintaining a place of business in this State or a retailer authorized by the Department pursuant to Section 6 hereof, and remitted to the Department, pursuant to the provisions of Section 9 hereof.

The tax hereby imposed and not paid to a retailer pursuant to the preceding paragraph of this Section shall be paid to the Department directly by any person using such property within this State, pursuant to the provisions of Section 10 hereof.

Retailers shall collect the tax from users by adding the tax to the selling price of tangible personal property, when sold for use, in the manner prescribed by the Department. The Department shall have the power to adopt and promulgate reasonable rules and regulations for the adding of such tax by retailers to selling prices by prescribing bracket systems for the purpose of enabling such retailers to add and collect, so far as practicable, the amount of such tax.

The tax herein imposed shall not apply to the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid, or to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educa-

tional purposes, when using tangible personal property purchased at retail.

To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances:

(a) The use, in this State, of tangible personal property acquired outside this State by a non-resident individual and brought into this State by such individual for his or her own use while temporarily within this State or while passing through this State;

(b) the use, in this State, of tangible personal property which, is acquired outside this State and which is moved into this State for use as rolling stock moving in interstate commerce;

(c) the use, in this State, of tangible personal property which is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another state in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in such other state;

(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or physically attached to or incorporated into other tangible personal property that is used solely outside this State.

If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this State."

Sec. 9 is as follows:

"Sec. 9. Each retailer required or authorized to collect the tax herein imposed shall pay to the Department the amount of such tax (except as otherwise provided), on or before the 15th day of the month following the calendar month during which such tax was collected. The first such remittance shall be due on or before September 15, 1955, for the tax collected during the preceding calendar month, but a retailer need not remit that part of any tax collected by him to the extent that he is required to remit and does remit the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property.

Where such tangible personal property is sold under a conditional sales contract, or under any other form of sale wherein the payment of the principal sum, or a part thereof, is extended beyond the close of the month for which the return is filed, the retailer, in collecting the tax (except when such a procedure would make compliance with Section 4 of the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933, as amended, impossible or impracticable), may collect, for each month, only the tax applicable to that part of the selling price actually received during such month.

On or before the 15th day of each month, such retailer shall also file a return for the preceding calendar month, the first such return being due by September 15, 1955, covering the preceding calendar month.

Where a retailer collects the tax with respect to the selling price of tangible personal property which he sells and the purchaser thereafter returns such tangible personal property and the retailer refunds the selling price thereof to the purchaser, such retailer shall also refund, to the purchaser, the tax so collected from the purchaser. When filing his return for the month in which he refunds such tax to the purchaser, the retailer may deduct the amount of the tax so refunded by him to the purchaser

from any other use tax which such retailer may be required to pay or remit to the Department, as shown by such return, provided that the amount of the tax to be deducted shall previously have been remitted to the Department by such retailer. If the retailer shall not previously have remitted the amount of such tax to the Department, he shall be entitled to no deduction hereunder upon refunding such tax to the purchaser.

Any retailer filing a return hereunder shall also include (for the purpose of paying tax thereon) the total tax covered by such return upon the selling price of tangible personal property purchased by him at retail from a retailer, but as to which the tax imposed herein was not collected from the retailer filing such return, and such retailer shall remit the amount of such tax to the Department when filing such return.

If experience indicates such action to be practicable, the Department may prescribe and furnish a combination or joint return which will enable retailers, who are required to file returns hereunder and also under the Retailers' Occupation Tax Act, to furnish all the return information required by both Acts on the one form.

Where the retailer has more than one business registered with the Department under separate registration hereunder, such retailer shall not file each return that is due as a single return covering all such registered businesses, but shall file separate returns monthly for each such registered business.

In his return, the retailer shall determine the value of any consideration other than money received by him in connection with the sale of any tangible personal property in the course of his business and he shall include such value in his return. Such determination shall be subject to review and revision by the Department in the manner hereinafter provided for the correction of returns.

All moneys received by the Department hereunder shall be paid into the General Revenue Fund of the State Treasury."

APPENDIX E

In each of the following states an exemption is given from the use tax as to purchases made within the state imposing the tax. The tax in these states is only imposed upon a purchaser buying property outside the state and then bringing it into the state.

Alabama (Sec. 789 Art. 11 Title 51, Code of 1940); Arkansas, (Sec. 84-3106 Ch. 31 Statutes of 1947 as amended 1949); Colorado, (Sec. 138-6-34 Ch. 138 Colorado Revised Statutes); Iowa, (Sec. 423.4 Ch. 423 Iowa Code Annotated); Kansas, (Sec. 79-3704 Art. 37 Ch. 79 General Statutes of Kansas Annotated); Michigan, (Sec. 205.94 Ch. 205 Compiled Laws of Michigan); Mississippi, (Sec. 10146-04 Division 3 Ch. 3 Mississippi Code); New Mexico, (Sec. 72-17-4 Art. 17 Ch. 72, New Mexico Statutes); North Dakota, (Sec. 57.4003 Ch. 57-40 North Dakota Revised Code); Ohio, (Sec. 5741.02 Ch. 5741 Page's Ohio Revised Code); Oklahoma, (Sec. 1310C Title 68, Oklahoma Statutes Annotated); Rhode Island, (p. 228 Acts and Resolves, 1947); South Carolina, (Sec. 65-1422 Ch. 15 Code of Laws South Carolina); South Dakota, (Sec. 57.4304 Ch. 57.43 South Dakota Code); West Virginia, (Sec. 999 (30C) Art. 15-A Ch. 11 West Virginia Code); Wyoming, (Sec. 32-2604 Ch. 32 Wyoming Compiled Statutes).

In each of the following states the use tax is due upon a domestic purchase only where the sales or retailers' tax upon the same transaction is not paid:

California, (Sec. 6401, Revenue and Taxation Code); Maryland, (Sec. 370 Art. 81 Annotated Code of Maryland); Nevada, (Sec. 372.345 Title 32 Ch. 360 Nevada Revised Statutes); North Carolina, (Sec. 105-220 Art. 8 Ch. 105 General Statutes North Carolina); Utah, (Sec. 59-16-4 Titles 59 Utah Code Annotated); Washington, (Sec. 82.12.030 Ch. 82.12 Revised Code Washington); Pennsyl-

vania, (Sec. 3403-201 Art. II Title 72 Purdon's Pennsylvania Statutes Annotated).

In Tennessee both a sales tax and a use tax are imposed by the same section of the statute (Sec. 67-3003 Title 67 Tennessee Code Annotated). The sales tax is imposed at the rate of 2% of the sales price of property when sold at retail "in this state." The use tax is imposed "at the rate of two per cent of the cost price of each item or article of tangible personal property when the same *is not sold* but is used, consumed, distributed or stored for use and consumption *in this state.*" (Italics supplied.) In defining the term "use tax" as used in the statute the Tennessee Supreme Court limits the tax to the privilege of bringing property into the state from without the state (*Broadacre Dairies v. Evans,* 193 Tenn. 441, 246 S.W. (2) 78-79, 1952).

In Florida, Louisiana and Georgia, use taxes are imposed in nearly the identical language as that just quoted from the Tennessee Code (Florida, Sec. 212.05 Ch. 212 Florida Statutes Annotated; Louisiana, (Sec. 47.302 Title 47 Louisiana Revised Statutes), Georgia, (Sec. 92-3402-A Title 92, Code of Georgia).

Maine has a combined sales and use tax. (Secs. 3-4 Ch. 17 Revised Statutes of Maine.) Sec. 4 provides that every person purchasing property at retail shall be liable for the use tax until he has paid it or taken a receipt from the seller "showing that the *seller has collected the sales or use tax in which case the seller shall be liable for it.*" (Italics supplied.) The Sales and Use Tax Law is one upon the retailer instead of the consumer with a limited right to pass the tax along to the consumer. (*W. S. Libbey Co.* v. *Johnson,* 148 Maine 410, 94 At. (2) 907; *Maine* v. *Hiscock,* 107 At. (2) 421. While both a sales tax and a use tax are imposed there is but one tax due. This is made manifest by Sec. 4 which imposes the use tax and provides, "Every

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Appellees.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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In our jurisdictional statement we said that the Illinois use tax act was unique and differed from use tax acts of all other states in that in Illinois (1) both the retailers' tax and the use tax are always rigidly due upon sales within the state, without exemption from the use tax of sales within the state as in the case of some state use tax acts or with the use tax only due where the retailers' tax is not paid as in the remaining states and (2) Illinois retailers keep as their own the taxes collected on Illinois purchases. That has not been challenged by appellees in their motion.

In Division "A" of their motion, appellees have defended Sec. 9 of the act with regard to the retention of the tax by the retailers; and in Division "B" they have defended

Sec. 3 of the act with regard to the exemption in question. We shall reply in the same order. However, appellees have argued in Division "A" that the use tax act is complementary to the retailers' act. That question has no bearing upon the validity of Sec. 9. It relates to the validity of Sec. 3. We shall, therefore, reply upon that question in Division "B" when discussing the validity of Sec. 3.

A

SEC. 9 OF THE USE TAX ACT IS INVALID

The essence of appellees' argument to justify the making of a gift of the use tax to Illinois retailers is that it "*is aimed at preventing two taxes from reaching the State Treasury.*" (Italics supplied). (Motion p. 19). The argument poses the issue instead of answering it. Without question the provision is aimed at preventing two taxes from entering the state treasury. That is the issue, not its answer. Had the act provided for the payment of the use tax into the state treasury we would not be objecting, as we are, that it makes a gift of public funds for a private purpose. It is because the act is "aimed at preventing two taxes from reaching the state treasury" that a resultant violation of the Fourteenth Amendment occurs in taking private property of use tax payers without due process of law. For appellees to thus justify the gift of the tax, by stating the issue instead of answering it, strips it of any justification at all.

In our jurisdictional statement we pointed out that the Illinois retailers' act is not a sales tax but an occupation tax upon retailers; that the sole duty of paying the tax rests upon retailers; and that they are not agents of the state to collect their own tax from purchasers (Jur. Stat. 17). As a consequence of the operation of Sec. 9 of the use tax act, an Illinois retailer, upon paying his tax (*which is levied upon him alone and not upon his purchaser*) is en-

titled to keep as his own the use tax which he has collected from his purchasers. The use tax is therefore levied on Illinois purchasers solely for the purpose of permitting Illinois retailers to reimburse themselves on account of their own tax obligations.

This provision whereby money in the form of taxes is taken from the pockets of Illinois purchasers and placed in the pockets of Illinois retailers is regarded by appellees in their motion as something purely "mechanical." Appellees state that when the "true purpose and function" of the provision in question is "understood" it is apparent that "the object of that purpose is a public purpose" (Appellees' motion p. 18). Appellees then stop short without a word to explain or support that the purpose is "public."

The only conceivable purpose of the provision in question is to levy a tax upon one class (retail purchasers in Illinois) to reimburse another class (Illinois retailers). A tax is a levy for the support of government (*United States* v. *Butler*, 297 U.S. 1-61, 1935). A tax has never been thought to mean an appropriation from one group for the benefit of another (*ibid.*). Whether a tax is for a public purpose has regard to the use to be made of the revenue derived from the tax. (*A. Magnano Company* v. *Hamilton*, 292 U.S. 40-43, 1934). The tax upon Illinois purchasers does not have the barest pretense of a public purpose. It is levied purely for the purpose of directly reimbursing a class of tax payers on account of their tax obligations. The tax levied does not enter the Illinois treasury and is not for a governmental purpose of any kind any more than were it a tax levied to pay the retailers' bank obligations or wholesale obligations.

If such a tax is for a public purpose, then so too would be a tax upon tenants to reimburse landlords for their real estate taxes or any other conceivable tax upon one class of taxpayers to reimburse another class on account of their

tax obligations or any other obligations they might have. If the Illinois legislature does not want its retailers to pay the tax it has levied upon them it can repeal it; but it cannot leave the tax in force and levy another tax for the purpose of furnishing retailers with the funds to reimburse themselves on account of the tax levied against them.

In seeking escape from their problem, appellees state that a retailer "still pays the retailer's occupation tax to the State; but instead of passing on that tax to the purchaser as most retailers used to do," the retailer now reimburses himself for the retailers' tax by retaining the use tax. Appellees should be well aware that a retailer does not have any legal right to shift his own retailers' tax to his customers, and his customers are under no legal obligation to pay it (*People's Drug Shop* v. *Maysey*, 384 Ill. 283, 1943. "Unambiguous provisions of the Retailers' Occupation Tax Act proclaim and the decisions of this court uniformly hold, that the tax imposed is upon retailers and not upon consumers and that the sole duty of paying the tax rests upon the former. It follows necessarily that plaintiff was without legal authority to collect from its consumer, the defendant, the challenged item in its invoices representing additional charges for retailers' occupation tax." *ibid.*, p. 287).

We submit that Sec. 9 of the act is an unvarnished appropriation of taxes for a private and non-governmental purpose.

B

SEC. 3 OF THE USE TAX ACT IS INVALID

The Illinois Supreme Court conceded that if the use tax act were not complementary to the retailers' act, the exemption given by Sec. 3 would be without reasonable basis (See footnote p. 20 Jur. Stat.). Manifestly it is arbitrary and unreasonable to impose a use tax upon a secretary

who purchases lunch at a restaurant but to impose no tax upon her employer who buys his lunch at his club. Neither is there any reasonable basis for the exemptions that apply to purchasers from any of the other service occupations (Jur. Stat. 20) unless the acts in question are complementary. Therefore, if the use tax act does not complement the retailers' act Sec. 3 must fall.

We argued (Jur. Stat. 22-23) that the use tax act did not "complete" or "supply the deficiency" of the retailers' act for either of the following reasons: (1) It does not merely plug the gap by taxing only out of state purchases that have escaped the retailers' act but introduces a new tax upon Illinois transactions that exists concurrently with the retailers' tax. A tax upon out of state purchases alone would have been a deterrent to Illinois residents making purchases outside the state. (2) The tax upon Illinois transactions is levied solely for the benefit of Illinois retailers who collect it. At tax levied for the private benefit of Illinois retailers destroys any notion that its purpose is to plug the gap and prevent tax evasion by Illinois residents buying outside the state.

The question is not whether the Illinois legislature endeavored to pass an act complementary to the retailers' act as appellees assume. The test is whether the acts are actually complementary. If it were otherwise, then any exemption in any revenue act, no matter how unreasonable, could be sustained by selecting some other revenue act and calling it complementary to that act no matter whether it was or not. Not every tax of a state for the use of its highways "completes" or "makes perfect" every other highway tax it may have. Not every tax of a state upon corporations complements every other tax it may impose upon corporations. To make one tax complementary to another there must not only be a legislative intent but also the complementary nature of the two acts must be realistically present.

In other states use taxes are clearly complementary to the retailers' or sales taxes. Both a use tax and a retailers' or sales tax are not due upon every sale within the state. Neither is the use tax remitted to the retailers of those states. Either an outright exemption is given from the use tax as to purchases made within the state or, in states where no outright exemption is given, the use tax upon local sales is only due when the retailers' or sales tax is not paid (Jur. Stat. 4).

To introduce a use tax upon Illinois purchases (even if it were paid into the state treasury) in addition to the tax upon retailers upon the identical sales and make both taxes due in all events prevents no tax avoidance of the already present retailers' tax; and to then go a step further and levy the use tax upon Illinois purchases solely, as here, for the remission of the proceeds to Illinois retailers neither enriches the state's tax income on account of purchases made outside the state by Illinois residents nor deters them from making such outside purchases, there already being present in the act a use tax as to outside purchases.

Although the substance of what we have just said was fully stated in our jurisdictional statement, appellees' motion has evaded a reply. Appellees state (Motion 10) that "The function of the use tax is to equalize the situation so that there is no legally known tax advantage in buying goods outside Illinois because of the existence of the retailers' occupation tax." In so giving a description of a complementary use tax, appellees have done so correctly. However, they do not and cannot make their description apply to the Illinois use tax act. There would be "no legally known tax advantage" buying outside Illinois if the act had only imposed the tax upon out of state purchases. As we have shown, imposing the tax upon Illinois purchases and remitting the proceeds to Illinois retailers removes any trace that the two acts are complementary.

Being unable to account how a use tax so imposed upon Illinois sales "completes" or "makes perfect" an already existing retailers' tax upon the same transactions, appellees state that it was necessary to impose the tax upon sales both within and without Illinois in order to satisfy the uniformity clause of the Illinois constitution. Whether or not the act in question is complementary to the retailers' act is not to be determined by whether the Illinois constitution would require a tax on sales both within and without the state. *The fact is that the use tax act is not complementary to the retailers' act; and it is not made any more complementary by the reason that it may or may not be in the only form permitted by the uniformity clause of the Illinois constitution.* A non-complementary use tax would not be turned into a complementary one because the Illinois constitution required it to be written in a form not complementary to the retailers' act.

For the reasons we have given, the two acts would not be complementary even though the rates of tax were the same. However, we have pointed out that the rates of tax are not always the same. This occurs where property given in trade is included in computing the purchase price for arriving at the use tax; but in computing the retailers' tax the property given in trade is excluded (Jur. Stat. 23-24). This is strong additional evidence that the two acts are not complementary.

Appellees argue that the foregoing results not from a difference in rate but from the operation of the tax. In adjudicating a tax measure this court is concerned only with its practical operations, not its definitions or the precise form of descriptive words which may be applied to it (*Wisconsin* v. *J. C. Penney Co.*, 311 U.S. 435-441, 1941). Although theoretically the rates of taxes of the retailers' act and use tax act may be the same there is no uniformity of tax. Uniformity in taxation implies equality in the

burden of tax; and the equality of burden cannot exist without uniformity in the mode of assessment as well as in the rate of taxation (*Greene* v. *Louisville and Interurban R.R. Co.*, 244 U.S. 499-515, 1916). Whatever may be the rates provided by the two acts, the fact remains that their operation produces a result as if the rates were not the same.

So far as the use tax is upon purchases made in Illinois, it has neither the purpose nor the efficacy of protecting or complementing the retailers' tax. The latter is fully enforcible and collectible upon Illinois sales without a use tax upon the same sales. No reason can be conceived (and appellees advance none) how the imposition of the use tax upon Illinois sales aids in any manner in the enforcement or collection of the retailers' tax upon the same sales. Neither does the use tax upon Illinois sales aid in the enforcement or collection of the retailers' tax so far as anything that may occur outside the state. A use tax upon Illinois sales is not a deterrent to an Illinois resident to avoid the retailers' act by buying outside the state. A use tax on out of state purchases alone would furnish the deterrent.

Respectfully submitted,

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Appellees.

MOTION TO DISMISS APPEAL

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 405

JOHN W. TURNER, JR., *Appellant*,

vs.

WARREN E. WRIGHT, Treasurer of the State of Illinois and RICHARD J. LYONS, Director of the Department of Revenue of the State of Illinois,

Appellees.

MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF ILLINOIS

Pursuant to Rule 16(b) of the Revised Rules of the Supreme Court of the United States, appellees in the above entitled case move to dismiss the appeal on the ground that no substantial federal question is presented.

OPINION BELOW

The opinion of the Illinois Supreme Court sustaining the validity of the Use Tax Act is reported in 11 Ill. (2) 161, 142 N.E. (2) 84. The appellant has printed the opinion as Appendix C, pages 41-52 of the Statement As To Juris-

diction, so it will not be necessary to reprint the opinion in this brief. References to this opinion will be designated as App. C of appellant's brief.

QUESTION PRESENTED

Whether appellant's charge that Sections 3 and 9 of the Use Tax Act violate the 14th Amendment presents a substantial Federal question.

STATUTE INVOLVED

For the Court's convenience, the Illinois Use Tax Act (Pars. 439.1-439.18 Ch. 120, Vol. 2, pgs. 816-820, Ill. Rev. Stats. 1955) is reproduced in full as Appendix A to this brief. All references will be to the pages in the Appendix where the portion of the statute in question will be found.

STATEMENT

Nature Of Illinois Use Tax Act

The Illinois Use Tax Act was designed to and does complement the admittedly valid Retailers' Occupation Tax Act. Under the Use Tax Act, a tax is imposed "upon the privilege of using in this State tangible personal property purchased at retail * * * from a retailer." (Sec. 3, App. A, p. 35a.)

The Use Tax is imposed at the same rate as the tax under the Retailers' Occupation Tax Act. It applies whether the property is purchased in Illinois or elsewhere. Retailers are required to collect the tax from users by adding the tax to the selling price of the tangible personal property when it is sold for use. (Sec. 3, App. A, p. 35a.) It does not apply to out-of-state transactions that would not measure a tax under the Retailers' Occupation Tax Act if they occurred in Illinois, nor is it applicable to the use of property purchased outside of Illinois on which a sale or use tax has been paid to another State, to the extent of the tax so paid (Sec. 3, App. 36a).

In order to prevent double taxation i.e., the application of the Retailers' Occupation Tax and the Use Tax to the sale of the same tangible personal property, the Use

Tax Act provides in Sec. 9, App. A, p. 41a-42a for offsetting the taxes in question:

> "The first remittance shall be due on or before September 15, 1955, for the tax collected during the preceding calendar month, but a retailer need not remit that part of any tax collected by him to the extent that he is required to remit, and does remit the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property."

Further evidence of the complementary character of the two acts and the legislative intent that only one tax shall apply to any transaction is found in Sec. 3 of the Use Tax Act (App. A, p. 37a which provides:

> "If the seller of tangible personal property for use would not be taxable under the Retailers' Occupational Tax Act despite all elements of the sale occurring in Illinois, the tax imposed by this act shall not apply to the use of such tangible personal property in this State".

To prevent actual or likely multi-state taxation, the Act also affords adequate safeguards in this respect. Sec. 3, (App. A, p. 36a-37a), forbids the application of the tax in the following respects:

(1) Where a non-resident brings property into the State temporarily or while passing through the State;

(2) Where the property is acquired outside this State and is moved into this State for use as rolling stock moving in interstate commerce;

(3). Where a similar tax has been paid in another state to the extent of the amount of such tax so paid in the other state;

(4). Temporary storage of property acquired outside and brought in and used solely outside the State or attached to the property used solely outside the State.

ARGUMENT

NO SUBSTANTIAL FEDERAL QUESTIONS ARE PRESENTED BY THIS APPEAL

The Illinois Use Tax Act is not unique legislation in any respect. It was designed to and does complement the admittedly valid Retailers' Occupation Tax Act. The object and purpose of the Act is identical with the acts of many other states namely, to equalize the tax burdens which heretofore were unequal and discriminated against Illinois citizens and Illinois retail merchants as the Retailers' Occupation Tax Act, standing alone, could not reach out-of-state purchases and transactions in interstate commerce. (*Norton Co.* v. *Department of Revenue*, 405 Ill. 314, vacated and remanded *Norton* v. *Department of Revenue*, 340 U. S. 534)

As the Use Tax applies primarily to goods shipped into Illinois in interstate commerce and purchases of goods made outside the State for use within the State, the practical effect of this complementary taxing system is to afford the Illinois retail merchant some measure of protection against competition with out-of-state sellers not subject to a retailers' tax. Furthermore, it produces revenue for the State that would otherwise be lost. Thus protection of

the Illinois merchant is, in fact, protection also for the valid Retailers' Occupation Tax. If the Illinois retailer is forced out of business or deprived of part of his business by a tax that does not reach his out-of-state competitor this revenue is lost to the State. In addition, some Illinois citizens were not carrying their fair share of the State's tax burden as they made purchases in other states to avoid the payment of local retailers' tax. In fact, the transaction upon which this appellant was taxed clearly demonstrates this point. Appellant, here, bought and took possession of a motor vehicle in Indiana for use and not for the purpose of resale in Illinois (Abs. 2). He did not pay any tax in Indiana or in any other State with respect to the sale, purchase or use of the motor vehicle (Abs. 5). Under the terms of the Use Tax Act (Sec. 10, App. A, p. 44a-45a he was required to pay a tax directly to the Department of Revenue of the State of Illinois. He paid the tax under protest and brought this suit for recovery of a refund.

This Court has repeatedly sustained Use Tax Acts of other states based on this same scheme of complementary laws as not violating the commerce clause of the U. S. constitution. (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167; *General Trading Co.* v. *State Tax Commission of Iowa*, 322 U. S. 335; *Nelson* v. *Sears Roebuck & Co.*, 312 U. S. 359; *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373.)

In *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, this Court sustained the validity of the use tax of the State of Washington, and approved its purpose and object, which is identical with the Illinois tax, by saying at page 581:

> "The plan embodied in these provisions is neither hidden nor uncertain. A use tax is never payable where the user has acquired property by retail purchase in the state of Washington, except in the rare instances in which retail purchases in Washington are not subjected to a sales tax. On the other hand, a use tax is always payable where the user has acquired property by retail purchase in or from another state, unless he has paid a sales or use tax elsewhere before bringing it to Washington. The tax presupposes everywhere a retail purchase by the user before the time of use. If he has manufactured the chattel for himself, or has received it from the manufacturer as a legacy or gift, he is exempt from the use tax, whether title was acquired in Washington or elsewhere. The practical effect of a system thus conditioned is readily perceived. One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax, or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales. Do these consequences which must have been foreseen, necessitate a holding that the tax upon the use is either a tax upon the operations of interstate commerce or a discrimination against such commerce obstructing or burdening it unlawfully?"

The appellant here does not challenge the validity of the instant tax on the ground that it violates the commerce clause of the United States constitution. In this connec-

tion, the Supreme Court of Illinois said, in its opinion sustaining the constitutionality of the Act: (App. C of appellant's br. p. 42)

> "The validity of the statute under the commerce clause of the Federal constitution is not challenged * * *."

In view of the previous decisions of this Court, and the lack of merit in appellant's specific contentions that the Use Tax Act violates the 14th Amendment of the United States constitution, this appeal should be dismissed. We will take up and dispose of appellant's specific contentions under Sees. A and B of this brief.

A.

Section 9 of the Illinois Use Tax Act does not violate due process requirements

The offsetting provision in Section 9 of the Illinois Use Tax Act (App. A, p. 41a-42a) does not result in a gift of public funds for a private purpose and does not constitute a taking of private property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. Appellant's criticism of the offsetting provision in question stresses form and ignores substance. To understand the purpose and effect of the challenged provision which allows retailers who collect the Illinois use tax from purchasers to retain that tax to the extent to which they are liable for and pay the tax that is imposed by the Illinois

'Retailers' Occupation Tax Act,' it is first necessary to understand the peculiarities of Illinois constitutional law. The adoption of the kind of Use Tax Act that has been adopted in Illinois was necessary before we could have a use tax which would complement the Illinois retailers' occupation tax and still satisfy the uniformity requirements of the Illinois Constitution, as construed by the Illinois Supreme Court. It is also important to have a clear picture of the mechanics and the operation of the Illinois Use Tax Act and its relation to the Illinois Retailers Occupation Tax Act.

The use tax is levied on the purchaser. In some cases, it must be collected from the purchaser by the seller. In other instances, the purchaser must pay the tax directly to the Department of Revenue. The use tax is aimed primarily at out-of-State purchases where the property will be used in Illinois, but where the seller cannot be taxed under an occupation tax law because of interstate commerce. The use tax complements the occupation tax which is imposed by the Retailers' Occupation Tax Act and which applies to persons engaged in the business of selling tangible personal property at retail in Illinois. The function of the use tax is to equalize the situation so that there is no legally known tax advantage in buying goods outside Illinois because of the existence of the retailers' occupa-

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Ill. Rev Stats., 1955, Ch. 120, Pars. 440-453.

tion tax. This protects Illinois revenues and Illinois retailers without giving local retailers any tax advantage over out-of-State sellers since the use tax rate and the retailers' occupation tax rate are the same—2½% of "gross receipts" or "selling price".[2] However, in addition to placing the legal burden of the use tax on users who do their buying from retailers outside Illinois, it has been necessary to impose the tax on users who make similar purchases in Illinois in order to satisfy the Illinois constitutional requirement of uniformity by placing the legal burden of the tax on all users who buy at retail from retailers. This was the setup that resulted in the Cigarette Use Tax Act[3] being held valid in 1952.[4] When the Motor Vehicle Use Tax subsequently deviated from this pattern and taxed only users buying outside Illinois, the Illinois Supreme Court held that Act unconstitutional as violative of the uniformity requirement of Section 1 of Article IX of the Illinois Constitution.[5] Thus it can be seen that it

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[2] Ill. Rev. Stats., 1955, Ch. 120, Pars. 439.3 and 441.

[3] Ill. Rev. Stats., 1955, Ch. 120, Pars. 453.31 et seq.

[4] *Johnson v. Halpin et al.*, 413 Ill. 257, 108 N.E. (2d) 429—Certiorari denied—345 U. S. 923, 73 S. Ct. 781, 97 L.ed. 668. This case involved the Cigarette Use Tax Act which complemented the Cigarette Tax Act (an occupation tax on a class of sellers) in exactly the same way that the present Use Tax Act complements the Retailers' Occupation Tax Act, and the Illinois Supreme Court said that the Cigarette Use Tax Act is a complementary Act and does satisfy constitutional requirements of uniformity.

[5] *People v. Carpentier*, 2 Ill. (2d) 468, 118 N.E. (2d) 815. At pages 475 and 476 in 2 Ill. (2d), the Illinois Supreme Court said:

> "It is contended that this tax is similar to that in the Cigarette Use Tax Act and that the act is valid as levying a complementary tax to that levied by the Retailers' Occupation Tax Act. Our decision in *Johnson v. Halpin*, 413 Ill. 257, is cited in support of this contention. That case can offer no such support as it is evident that there is a salient difference between the Motor Vehicle Tax Act and the Cigarette

would be impossible under the Illinois Constitution to follow appellant's suggestion of adopting, in Illinois, exactly the same form of complementary Use Tax as several other states have adopted, so the Illinois General Assembly sought to accomplish the same total legal and economic effect in making the present general Use Tax Act complement the Retailers' Occupation Tax Act by following the mechanical pattern that it had employed successfully in the case of the Cigarette Use Tax Act.

The result of taxing local purchases at retail as well as similar out-of-State purchases is that the use tax has simply been superimposed on the retailers' occupation tax. To prevent tax pyramiding by having both the retailers' occupation tax and the use tax collected by the State on Illinois sales, the Use Tax Act contains an offsetting provision like that in the Cigarette Use Tax Act.[6] 'The retailer must collect the use tax, but then keeps it to the extent that he is liable for retailers' occupation tax on the

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Use Tax Act. A review of the statutes will reveal that the former (by the Secretary's construction) provides for no general tax upon all users of motor vehicles in this State. If the Retailers' Occupation Tax Act were repealed or substantially changed those who bought motor vehicles from Illinois dealers would escape the burden of this use tax. However, as pointed out in *Johnson* v. *Halpin*, 413 Ill. 257, the cigarette use tax is 'a tax on the local use of cigarettes and in no way discriminates against purchasers who buy their cigarettes outside of the State, since they pay the same tax as purchasers from Illinois distributors. There are no offset credit provisions for payment of the retailers' occupation tax against the payment of the use tax; there are no requirements that the former tax be paid. If an Illinois dealer fails to remit the occupation tax it will not prevent the Illinois purchaser from getting his certificate of title or license plates. These discriminatory features point up the decided lack of equality and uniformity required by both State and Federal constitutions. . . .'

[6] Ill. Rev. Stats., 1955, Ch. 120, Par. 453-33.

same transaction. The retailer still pays the retailers' occupation tax to the State; but instead of passing on that tax to the purchaser as most retailers used to do, the retailer now reimburses himself for the retailers' occupation tax by collecting and retaining the use tax.

There will be many out-of-State retailers who must collect the use tax in situations in which the seller is not liable for retailers' occupation tax because of interstate commerce. In that case, the retailer must remit the use tax to the State since he will not be paying, on the same transaction, retailers' occupation tax which he can offset against the use tax that he collects. This will happen, for example, where the seller has nothing here but soliciting agents. Such seller must collect the use tax according to this Court (*General Trading Company* v. *State Tax Commission of Iowa*, 322 U. S. 335), but would not be liable for retailers' occupation tax (*Norton Company* v. *Department of Revenue*, 340 U. S. 534). Similarly, a seller with a taxable retail outlet in Illinois is not liable for retailers' occupation tax on independent sales which are strictly interstate mail transactions (*Norton Company* v. *Department of Revenue*, 340 U. S. 534). However, such seller is required to collect the use tax on the interstate mail transactions (*Nelson* v. *Sears, Roebuck & Company*, 312 U. S. 359; *Nelson* v. *Montgomery Ward & Company*, 312 U. S. 373). Even out-of-State sellers who have nothing

here (no office or other facilities, no goods and no agent) can voluntarily obtain a permit to collect the use tax under the statute, although such a seller cannot legally be compelled to collect the tax (*Miller Brothers Company* v. *State of Maryland*, 347 U. S. 340). Whenever possible, the procedure is to have the seller collect the use tax from the purchaser; but if the purchaser makes an out-of-State purchase from a seller who is neither required nor authorized to collect the use tax, the purchaser is required to pay the use tax directly to the Department, (Sec. 10, App. A, p. 44a).

The foregoing picture of the Illinois tax setup as compared with what it would be without the use tax should make it eminently clear that the Illinois use tax does serve both the purposes which it should serve according to appellant's argument and according to *Miller Brothers Company* v. *State of Maryland*, 347 U. S. 340.

Appellant places great relaince on the belief that since 28 states make the use tax complement a local tax in a certain way (ie., by taxing only purchases made outside the state since the local tax already applies to similar purchases made within the taxing state), another mechanical process (that of Illinois) which accomplishes the same result is necessarily not "complementary". In most other states, the local tax (a sales tax) is already laid on the purchaser, with the retailer being a tax collector for the state. (A detailed listing of such states, with citations,

will be found in Appendix B to this motion.) Therefore, in those states, the use tax need only tax purchasers who buy outside the state from retailers in order to cause intrastate and similar out-of-state buying to be taxed. Since the retailers' occupation tax is on the seller, the Illinois use tax had to go a step further to complement the retailers' occupation tax and supply the deficiency of placing the legal burden of a tax both on purchases within Illinois from retailers and on purchases outside Illinois from retailers, as the uniformity requirement of the Illinois Constitution necessitates according to the Illinois Supreme Court. (*People* v. *Carpentier*, 2 Ill. (2d) 468.) However, when the retailers' occupation tax and the use tax are put together and the offsetting provision in the Use Tax Act is taken into consideration, the overall legal and economic effect is the same as that in other states (i.e., purchases at retail from retailers are taxed whether such purchases are made in the taxing state or outside such state).

In determining the nature of a state tax and constitutionality of the statute imposing it, the Court must regard substance rather than form and the controlling test is found in the operation and effect of the statute as applied and enforced. (*St. Louis S. W. Ry.* v. *Arkansas*, 235 U. S. 350, 362) The appellees submit that this Court should be more concerned with substance and effect than with form and mechanical procedures. If results are viewed,

rather than the mechanical procedures by which those results are achieved, the Illinois situation with the use tax is not different from that in other states which have use taxes, and the Illinois use tax is just as complementary as that of any other state. Such differences in mechanics as do exist are the result of the difference between the basic taxes that are being complemented (an occupation tax on the retailer in Illinois, and sales taxes on purchasers in most other states), but the Illinois result is the same as that achieved by other states without imposing their use taxes on purchases that are made at retail from retailers within the taxing states.

It may be well and good for appellant blandly to suggest that all the Illinois Legislature has to do in order to have a valid use tax is to levy the tax merely on purchasers who buy at retail from retailers outside Illinois, but that unfortunately is simply not true, as *People* v. *Carpentier*, 2 Ill. (2d) 468 conclusively shows. The only other known way by which to get the same result that other states have achieved is to adopt the mechanical setup which the present Illinois Use Tax Act has adopted, and which was successfully used and sustained by the Illinois Supreme Court in the case of the Cigarette Use Tax Act in *Johnson* v. *Halphin et al*, 413 Ill. 257.

Appellees believe that the Illinois Supreme Court dealt effectively in its opinion in this case with appellant's con-

tention that the Illinois Use Tax Act is not a complementary law, and that the offsetting provision in Section 9 of that Act constitutes a gift of public money for private purposes, in the following excerpt from the Court's opinion: (App. C of appellant's br. p. 44-46.)

> "While the plaintiff concedes that the constitution does not prohibit the imposition of a complementary use tax, he argues that the present statute is invalid. He points to the fact that other States that have use taxes impose them only upon the purchase of property outside the State for use within it, and he argues that the Illinois tax is not complementary because it falls upon purchases made within the State as well as upon those made outside, and thus introdues a new tax upon domestic transactions. The act requires the Illinois retailer to collect the use tax upon the sales he makes. It does not require him to remit that tax to the State, however, to the extent that he remits the retailers' occupation tax with respect to the sale of the same property. (Section 9.) Plaintiff also contends that this setoff provision provides for a gift of public funds to private individuals, permits the commutation of taxes and provides for the cancellation of a debt due to the State, all in violation of the constitution. Const., art. IX, secs. 6 and 7; art, IV, sec. 23.
>
> "The statute provides for a use tax that falls alike on those who purchase at retail within the State and those who purchase outside of it. That tax is to be collected by the Illinois retailer, but to the extent that he remits the tax due under the Retailers' Occupation Tax Act he is not required to remit the tax due under the Use Tax Act. The tacit assumption of the statute is that by this mechanism the tax advantage that was enjoyed by the buyer who purchased outside the State will be eliminated, without increasing the burden upon the buyer who purchases within the State. The accuracy of that assumption is not challenged. The Illinois retailer is required to remit one

tax of 2½ per cent with respect to each sale within the State. That is the same tax that is levied with respect to each out-of-State purchase for use within the State. It is true that the scheme of this tax is more complex than that of a use tax that falls only on out-of-State purchases. But its purpose and its results are those of the typical use tax, and the formal differences in the method by which those purposes are accomplished do not affect the validity of the statute.

"It is not intended that both taxes shall reach the treasury with respect to a single transaction. It is intended and provided that one tax, and only one, shall reach the State treasury with respect to each purchase of property for use within the State, whether or not the purchase is made within Illinois. To that end the statute provides that the use tax collected by the retailer does not constitute a debt owed by him to the State when he is relieved of the duty of remitting such tax to the Department by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act upon his gross receipts from the same transaction.' (Section 8.) *Only if the way in which the two taxes are interrelated is ignored is it possible to say that there is here a gift of public funds, commutation of taxes, or the cancellation of a debt owing to the State. The method by which the two taxes are integrated may be cumbersome, but it is not unconstitutional.*" (Underlining supplied.)

When the true purpose and function of the offset provision in Section 9 of the Illinois Use Tax Act is thus understood and considered, it should be apparent that the object of that purpose is a public purpose and that it does not result in a gift of public funds for a private purpose. Therefore, no private property is being taken without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States.

On Page 16 of its Statement As To Jurisdiction, appellant seeks to make capital out of the fact that Illinois retailers remit the retailers' occupation tax to the State and keep the use tax which they collect by way of reimbursement, whereas out-of-State retailers who are exempt from the retailers' occupation tax because of interstate commerce, but who are required or authorized to collect the use tax, actually remit the use tax which they collect to the State since they have no offsetting retailers' occupation tax liability by which to reduce such use tax remittance to the State. Appellant says that the offsetting provision is solely for the benefit of the Illinois retailers. As a matter of fact, it is not for the *benefit* (meaning profit or financial gain) of anyone, but is simply aimed at preventing two taxes from reaching the State Treasury on Illinois sales. Illinois retailers are no better off because of the offsetting provision than out-of-State retailers who collect the use tax and actually remit it to the State. Since the rate of the retailers' occupation tax and the rate of the use tax are the same (2½%), the tax collected and paid to the State by the out-of-State retailer is the same in amount as the tax collected and the tax paid to the State by the Illinois retailer. The only difference lies in the caption or designation under which the retailer remits the tax to the State. The out-of-State retailer remits it as use tax. The Illinois retailer remits it as retailers' occupation tax.

For such informational value as it may be, appellees wish to point out certain consequences which will result as a practical matter if the offsetting provision is invalid. In that event, it would be a practical impossibility to have a use tax in Illinois because we cannot, for Illinois constitutional reasons, simply tax users who do their buying outside Illinois while exempting users who do their buying from retailers in Illinois, (*People* v. *Carpentier*, 2 Ill. (2d) 468), and the Legislature cannot risk repealing the Retailers' Occupation Tax Act and substituting a Use Tax Act like the present one except for omitting the offsetting provision without being able to determine in advance that such Use Tax Act would be held constitutional on all counts in the specific form in which it might be enacted. Also, invalidation of the Use Tax Act on this ground would mean that the Illinois Cigarette Use Tax Act is likewise unconstitutional since it is dependent upon the same kind of procedure for the accomplishment of its purpose of complementing the Illinois Cigarette Tax Act.[7]

Appellant's argument concerning due process rests solely on a matter of statutory form and completely ignores substantive consequences. Since (as appellant concedes) this Court has many times upheld state use tax laws in relation to due process and other Federal Constitutional objections, and since the total legal and economic effects of

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[7] Ill. Rev. Stats., 1955, Ch. 120, Pars. 453.1-453.30.

the Illinois statutory setup by which the Illinois Use Tax Act complements the Illinois Retailers' Occupation Tax Act are not different from those effects which other states have achieved by a different procedure or mechanical process, appellees submit that the appellant's attack upon the offsetting provision in Section 9 of the Illinois Use Tax Act fails completely to present any Federal question of substance or merit.

B.

Validity of basic classification of the Use Tax Act in relation to the Fourteenth Amendment of the Constitution of the United States

Section 3 of the Illinois Use Tax Act, in exempting purchases at retail in kinds of transactions in which the seller would not incur retailers' occupation tax liability if all elements of the sale occurred in Illinois, does not create a discriminatory classification in violation of the Fourteenth Amendment of the Constitution of the United States. If a Use Tax Act is to complement a sales tax law or an occupation tax law, it is not unreasonable for the Use Tax Act to be predicated on the same classification (and therefore to contain the same exemptions) as the law that is being complemented. On the contrary, no matter what the exemptions in the law that is being complemented may be, it is entirely logical for the complementing statute to

contain the same exemptions except for the loophole or loopholes which the complementing statute is designed to close. A use tax act is generally aimed only at broadening the tax base to the extent of closing an interstate commerce loophole (i.e., to the extent of taxing out-of-State purchases that cannot be reached under the sales tax or occupation tax law that is being complemented) and (in the case of the Illinois Constitution, because of the State Court's interpretation of it) to the extent necessary to tax the same kinds of purchases when made in Illinois since the retailers' occupation tax (unlike the sales taxes of most states) does not technically and legally fall on the buyer when he does his buying in Illinois. However, there is no constitutional requirement which would make it necessary for the Illinois use tax to go further and attempt to tax kinds of transactions (such as isolated or occasional sales made by persons who are not retailers; sales that are incidental to the seller's engaging in a service occupation, etc.) which are not subject to the Illinois Retailers' Occupation Tax Act— the law that is being complemented. In the required respects, the Illinois Use Tax Act is complementary except in an immaterial, nondiscriminatory respect as to the value of trade-ins, which will be discussed more fully herein later.

On the question of classification, which can come into question in relation to the "equal protection" clause of the Fourteenth Amendment of the Constitution of the United

States, this Court has often held that it will not disturb the State Legislature's establishment of a classification unless the distinctions resulting from the classification are so arbitrary and unreasonable as to have no apparent basis in fact. For example, see *Heisler* v. *Thomas Colliery Co.*, 260 U. S. 245, in which this Court upheld the action of the Pennsylvania Legislature in classifying bituminous coal differently from anthracite coal for tax purposes. Although both items are coal, the Court pointed out that there are differences in the physical properties and the uses of the two types of coal and that this would be sufficient to justify the Legislature of Pennsylvania in imposng a tax applicable to the one type of coal, but not applicable to the other. The Court made it clear that it would not disturb the classification made by a State Legislature for tax purposes unless the classification was so arbitrary and unreasonable as to have no apparent basis in fact whatever. There is nothing arbitrary or unreasonable about exempting purchases from sellers who are not retailers from a Use Tax Act which seeks to complement a tax law whose scope is limited to the taxation of sales that are made by retailers. On the contrary, it would be unreasonable to demand that the complementing use tax reach out and tax kinds of uses which are not within the statute that is being complemented when a question of its application to a seller who makes sales for use arises.

The Illinois Supreme Court justified the classification by which the Illinois Use Tax Act does not tax every conceivable kind of use (but seeks only to tax the kinds of transactions—purchases at retail from retailers—which are subject to the retailers' occupation tax when the question of the seller's tax liability on an Illinois sale is involved) in the following language: (App. C of appellant's br. p. 47-48.)

> "There are actions that the retailers' tax does not reach, because although they involve the physical transfer of personal property at retail, the element of service is so pronounced that it has been thought to dominate the element of sale. (See, e.g., *Mahon* v. *Nudelman*, 377 Ill. 331; *Huston Brothers Co.* v. *McKibbin*, 386 Ill. 479.) The use tax also exempts these transactions, and plaintiff argues that because it does so it is unconstitutional. While the distinctions that have been drawn are admitted to be relevant to an occupation tax upon retailers, they are said to be irrelevant, and therefore arbitrary and discriminatory, when included in a tax that falls upon the privilege of using property purchased at retail.
>
> "The argument would, we think, be persuasive *if the use tax stood alone*, for so far as use by the purchaser is concerned there is no distinction between a tailormade suit of clothes, for example, and one purchased at retail. But the tax before us does not stand alone. *It is designed to complement and to protect the tax imposed upon the occupation of selling at retail, and the validity of its exemptions is to be determined in the light of that purpose.* The question here is not whether the legislature *is required* to shape the use tax that it imposes to conform to the tax upon retailers, but whether it *may constitutionally do so*. We think that it may. The purpose of the use tax is to protect the base of the retailers' tax and the classification adopted is reasonably directed to this end. Whether the General Assembly could go further and broaden

the base of the use tax beyond the limits of the occupation tax upon retailers is not before us." (Underlining supplied.)

Appellant does not contend that the classification in question in Section 3 of the Illinois Use Tax Act would be discriminatory in violation of the Fourteenth Amendment of the Constitution of the United States if it should be determined that the Illinois Use Tax Act is complementary to the Illinois Retailers' Occupation Tax Act. What appellant does contend is that the Illinois Use Tax Act is not in fact a complementary statute. Appellant bases this contention on the ground that the Illinois Use Tax Act taxes domestic purchases at retail as well as out-of-State purchases at retail instead of following the pattern in other states of exempting domestic purchases at retail from the use tax and taxing only out-of-State purchases at retail. We believe that we have fully explained and answered this point in the preceding section (Section A) of this motion wherein we explained that this added feature of the Illinois Use Tax Act (though largely a matter of form) is necessary to satisfy the Illinois Supreme Court's construction of the uniformity requirement of the Illinois Constitution. It seems clear, as a matter of substance, that the Illinois Use Tax Act does not fail to qualify as a complementary statute for this reason since the total legal and economic effect of the Illinois Retailers' Occupation Tax Act

and the Illinois Use Tax Act are not different from that which obtains in other states.

Appellant's other reason for believing that the Illinois Use Tax Act is not, in substance, a complementary statute is that, where traded-in property is a part of the consideration for a sale, the use tax applies to more of the selling price than the retailers' occupation tax does because the use tax applies to the receipts in money plus the value of the trade-in, whereas the retailers' occupation tax applies only to the receipts in money. It is erroneous for appellant to argue that this produces any difference in the tax rates under the two statutes. The rate of tax under the Retailers' Occupation Tax Act is 2½%, and the rate of tax under the Use Tax Act is 2½%. (Sec. 3, App. A, p. 35a.) The difference between the amount of the use tax due and the amount of retailers' occupation tax due on a transaction involving a trade-in is not due to any difference in the tax rates under the two statutes, but results simply from the fact that a larger part of the selling price is subject to the use tax in such a case than is subject to the retailers' occupation tax. However, this produces no discrimination and does not result in any financial gain to any private person. If the user makes his purchase outside Illinois from an unregistered seller, so that he pays the use tax directly to the State, he will pay 2½% of the full selling price

(money paid plus the value of the trade-in). If the user makes his purchase from a registered retailer, he will pay the same amount of use tax to the seller. The seller is required by Section 9 of the Use Tax Act to remit the use tax that he collects to the State except to the extent that he has an offsetting retailers' occupation tax liability on the same transaction. In such a case, the retailer would pay 2½% of the receipts in money to the State as retailers' occupation tax, and he would pay 2½% of the value of the trade-in to the State as use tax. But the State would get all of the tax (2½% on the full selling price, including the receipts in money and the value of the trade-in), and the user would pay the same amount of tax whether he pays the tax to the State or to the retailer.

In its opinion in this case, the Illinois Supreme Court pointed up the foregoing explanation in the following passage which appellant quoted in the Statement As To Jurisdiction as far as the reference to the fact that the use tax on the example given would be $75.00 and the retailers' occupation tax would be $50.00, but which appellant did not see fit to finish: (App. C of appellant's br. p. 46-47)

> "There is, however, one respect in which the use tax does not precisely complement the retailers' occupation tax. The former tax is based upon 'selling price,' the latter on 'gross receipts' from sales. 'Selling price' is defined in both statutes to mean the consideration for a sale valued in money whether received or paid in money or otherwise, 'including cash, credits,

service and property of every kind or nature * * *.' (Ill. Rev. Stat. 1955, chap. 120, pars. 439.2, 440.) By an amendment in 1955, however, the definition of 'gross receipts' in the Retailers' Occupation Tax Act was amended so that it 'means the total selling price * * *, excluding therefrom any amount allowed as credit for tangible personal property taken in trade.' (Ill. Rev. Stat. 1955, chap. 120, par. 440.) The result of this discrepancy in definitions is that in cases in which property is received in trade as a part of the purchase price, the tax due may not be the same under the two statutes. For example, if a new car is purchased for $3000 and the buyer's old one is received in trade at $1000, the use tax will be $75. Under the Retailers' Occupation Tax Act, however, the value of the old car would not be included in the 'gross receipts' on which the tax is computed, so that the tax would be $50. 'The retailer, however, is required to remit to the Department the full $75, because he is excused from remitting the use tax that he collects only to the extent that he remits the retailer's tax with respect to the same transaction.' No discrimination between purchasers is involved in this situation, because each purchaser is required to pay the same amount as every other purchaser. And there is no unjust enrichment of the retailer, for he is required to remit to the Department the full amount that he has collected. That the two taxes are not precisely identical therefore deprives no one of any constitutional rights."

Consequently, there is no substance to appellant's argument that the slight difference between the Illinois Use Tax Act and the Illinois Retailers' Occupation Tax Act in the treatment of trade-ins is material enough to prevent the two Acts from being complementary, or that the difference produces any harm or discrimination or deprives anyone of any rights.

For the reasons given, it seems clear that the Illinois Use Tax Act does complement the Illinois Retailers' Occupation Tax Act in all material respects. If so, by appellant's own theory, the classification by which the Use Tax Act taxes only those users who purchase at retail from retailers is reasonable in relation to the Act's purpose of complementing the Illinois Retailers' Occupation Tax Act which is founded on the same classification when the question of the seller's liability on an Illinois sale arises. Consequently, there is no substance or merit to appellant's contention that this classification in Section 3 of the Illinois Use Tax Act results in a discriminatory classification in violation of the Fourteenth Amendment of the Constitution of the United States, so appellant's contention wholly fails to present any substantial Federal question.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this appeal from the judgment of the Supreme Court of Illinois should be dismissed as it does not present a substantial Federal question for the decision of this Court.

Respectfully submitted,

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APPENDIX A

ILLINOIS USE TAX ACT

Approved: July 14, 1955—Effective: August 1, 1955

An Act in relation to a tax upon the privilege of using tangible personal property in this State, to make appropriations to the Department of Revenue and to the Secretary of State in connection therewith and to make certain incidental but necessary corrollary changes as an enforcement aid in the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933, as amended, by amending Section 4 of said Uniform Motor Vehicle Anti-Theft Act.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

Section 1. This Act shall be known and may be cited as the "Use Tax Act".

Section 2. "Use" means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale or use for demonstration by him of that property in any form as tangible personal property in the regular course of business. "Use" shall not mean the interim use of tangible personal property by a retailer before he sells such tangible personal property and shall not mean the physical incorporation of tangible personal property, as an ingredient or constituent, into

other tangible personal property (a) which is sold in the regular course of business or (b) which the person incorporating such ingredient or constituent therein has undertaken at the time of such purchase to cause to be transported in Interstate Commerce to destinations outside the State of Illinois.

"Purchase at retail" means the acquisition of the ownership of, or title to, tangible personal property, through a sale at retail.

"Purchaser" means any person who through a sale at retail acquires the ownership of or title to the tangible personal property that is sold.

"Sale at retail" means any transfer of the ownership of, or title to, tangible personal property to a purchaser, for use, and not for resale, and for a valuable consideration. Transactions whereby the possession of the property is transferred but the seller retains the title as security for payment of the selling price shall be deemed to be sales.

"Selling price" means the consideration paid for a sale valued in money whether received or paid in money or otherwise, including cash, credits, service and property of every kind or nature and shall be determined without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost or any other expense whatsoever, but shall not include interest or finance

charges which appear as separate items on the bill of sale or sales contract and shall not include charges that are added to prices by sellers on account of the seller's tax liability under the Retailers' Occupation Tax Act, or on account of the seller's duty to collect, from the purchaser, the tax that is imposed by this Act, or on account of the seller's tax liability under the Municipal Retailers' Occupation Tax Act.

"Department" means the Department of Revenue.

"Person" means any natural individual, firm, partnership, association, joint stock company, joint adventure, public or private corporation, or a receiver, executor, trustee, conservator or other representative appointed by order of any court.

"Retailer" means and includes every person engaged in the business of selling tangible personal property for use, and not for resale in any form.

The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail does not make such person a retailer hereunder; provided that any person who is engaged in a business which is not subject to the tax imposed by the Retailers' Occupation Tax Act because of involving the sale of or a contract to sell

real estate or a construction contract to improve real estate, but who, in the course of conducting such business, transfers tangible personal property to users or consumers in the finished form in which it was purchased, and which does not become real estate, under any provision of a construction contract or real estate sale or real estate sales agreement entered into with some other person arising out of or because of such nontaxable business, shall be considered to be a retailer to the extent of the value of the tangible personal property so transferred. If, in such a transaction, a separate charge is made for the tangible personal property so transferred, the value of such property, for the purposes of this Act, shall be the amount so separately charged, but not less than the cost of such property to the transferor; if no separate charge is made, the value of such property, for the purposes of this Act, shall be the cost to the transferor of such tangible personal property.

"Retailer maintaining a place of business in this State", or any like term, shall mean and include any retailer having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent is located here permanently or temporarily,

or temporarily, or whether such retailer or subsidiary is licensed to do business in this State.

Section 3. A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail on and after August 1, 1955, from a retailer. Until and including June 30, 1957, such tax is at the rate of 2½% of the selling price of such property; and after June 30, 1957; at the rate of 2% of such selling price.

The tax hereby imposed shall be collected from the purchaser by a retailer maintaining a place of business in this State or a retailer authorized by the Department pursuant to Section 6 hereof, and remitted to the Department, pursuant to the provisions of Section 9 hereof.

The tax hereby imposed and not paid to a retailer pursuant to the preceding paragraph of this Section shall be paid to the Department directly by any person using such property within this State, pursuant to the provisions of Section 10 hereof.

Retailers shall collect the tax from users by adding the tax to the selling price of tangible personal property, when sold for use, in the manner prescribed by the Department. The Department shall have the power to adopt and promulgate reasonable rules and regulations for the adding of such tax by retailers to selling prices by prescribing bracket systems for the purpose of enabling such

retailers to add and collect, as far as practicable, the amount of such tax.

The tax herein imposed shall not apply to the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid, or to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or educational purposes, when using tangible personal property purchased at retail.

To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances:

(a) The use, in this State, of tangible personal property acquired outside this State by a non-resident individual and brought into this State by such individual for his or her own use while temporarily within this State or while passing through this State; —

(b) the use, in this State, of tangible personal property which is acquired outside this State and which is moved into this State for use as rolling stock moving in interstate commerce;

(c) the use, in this State, of tangible personal property which is acquired outside this State and caused to be

brought into this State by a person who has already paid a tax in another state in respect to the sale, purchase or use of such property, to the extent of the amount of such tax so paid in such other state;

(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or physically attached to or incorporated into other tangible personal property that is used solely outside this State.

If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this State.

Section 4. Evidence that tangible personal property was sold by any person for delivery to a person residing or engaged in business in this State shall be prima facie evidence that such tangible personal property was sold for use in this State.

Section 5. Every retailer maintaining a place of business in this State and making sales of tangible personal property for use in this State (whether such sales are made within or without this State) shall, when collecting the tax as provided in Section 3 of this Act from the purchaser,

give to the purchaser (if demanded by the purchaser) a receipt therefor in the manner and form prescribed by the Department. Such receipt shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may relate. Each such retailer shall list with the Department the names and addresses of all his agents operating in this State and the location of any and all of his distribution or sales houses, offices or other places of business in this State.

Section 6. A retailer maintaining a place of business in this State, if required to register under the Retailers' Occupation Tax Act, need not obtain an additional Certificate of Registration under this Act, but shall be deemed to be sufficiently registered by virtue of his being registered under the Retailers' Occupation Tax Act. Every retailer maintaining a place of business in this State, if not required to register under the Retailers' Occupation Tax Act, shall apply to the Department (upon a form prescribed and furnished by the Department) for a Certificate of Registration under this Act. In completing such application, the applicant shall furnish such information as the Department may reasonably require. Upon approval of an application for Certificate of Registration, the Department shall issue, without charge, a Certificate of Registration to the applicant. Such Certificate of Registration shall be displayed at the address which the applicant states in his applica-

tion to be the principal place of business or location from which he will act as a retailer in this State. If the applicant will act as a retailer in this State from other places of business or locations, he shall list the addresses of such additional places of business or locations in this application for Certificate of Registration, and the Department shall issue a Sub-Certificate of Registration to the applicant for each such additional place of business or location. Each Sub-Certificate of Registration shall be conspicuously displayed at the place for which it is issued. Such Sub-Certificate of Registration shall bear the same registration number as that appearing upon the Certificate of Registration to which such Sub-Certificates relate. Where a retailer operates more than one place of business which is subject to registration under this Section and such businesses are substantially different in character or are engaged in under different trade names or are engaged in under other substantially dissimilar circumstances (so that it is more practicable, from an accounting, auditing or bookkeeping standpoint, for such businesses to be separately registered), the Department may require or permit such person to apply for and obtain a separate Certificate of Registration for each such business or for any of such businesses instead of registering such person, as to all such businesses, under a single Certificate of Registration supplemented by related Sub-Certificates of Registration. No Certificate of Regis-

tration shall be issued to any person who is in default to the State of Illinois for moneys due hereunder.

The Department may, in its discretion, upon application, authorize the collection of the tax herein imposed by any retailer not maintaining a place of business within this State, who, to the satisfaction of the Department, furnishes adequate security to insure collection and payment of the tax. Such retailer shall be issued, without charge, a permit to collect such tax. When so authorized, it shall be the duty of such retailer to collect the tax upon all tangible personal property sold to his knowledge for use within this State, in the same manner and subject to the same requirements, including the furnishing of a receipt to the purchaser (if demanded by the purchaser), as a retailer maintaining a place of business within this State. The receipt given to the purchaser shall be sufficient to relieve him from further liabiltiy for the tax to which such receipt may refer. Such permit may be revoked by the Department as provided herein.

Section 7. It is unlawful for any retailer to advertise or hold out or state to the public or to any purchaser, consumer or user, directly or indirectly, that the tax or any part thereof imposed by Section 3 hereof will be assumed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it

or any part thereof will be refunded other than when the retailer refunds the selling price and tax because of the merchandise's being returned to the retailer or other than when the retailer credits or refunds the tax to the purchaser to support a Claim for Credit under the Retailers' Occupation Tax Act. Any person violating any of the provisions of this Section within this State shall be guilty of a misdemeanor and subject to the penalties provided in this Act.

Section 8. The tax herein required to be collected by any retailer pursuant to this Act, and any such tax collected by any retailer shall constitute a debt owed by the retailer to this State, except when such retailer is relieved of the duty of remitting such tax to the Department by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act upon his gross receipts from the same transaction.

Section 9. Each retailer required or authorized to collect the tax herein imposed shall pay to the Department the amount of such tax (except as otherwise provided), on or before the 15th day of the month following the calendar month during which such tax was collected. The first such remittance shall be due on or before September 15, 1955, for the tax collected during the preceding calendar month, but a retailer need not remit that part of any tax collected

by him to the extent that he is required to remit and does remit the tax imposed by the Retailer's Occupation Tax Act with respect to the sale of the same property.

Where such tangible personal property is sold under a conditional sales contract, or under any other form of sale wherein the payment of the principal sum, or a part thereof, is extended beyond the close of the month for which the return is filed, the retailer, in collecting the tax (except when such a procedure would make compliance with Section 4 of the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933, as amended, impossible or impracticable), may collect, for each month, only the tax applicable to that part of the selling price actually received during such month.

On or before the 15th day of each month, such retailer shall also file a return for the preceding calendar month, the first such return being due by September 15, 1955, covering the preceding calendar month.

Where a retailer collects the tax with respect to the selling price of tangible personal property which he sells and the purchaser thereafter returns such tangible personal property and the retailer refunds the selling price thereof to the purchaser, such retailer shall also refund, to the purchaser, the tax so collected from the purchaser. When filing his return for the month in which he refunds

such tax to the purchaser, the retailer may deduct the amount of the tax so refunded by him to the purchaser from any other use tax which such retailer may be required to pay or remit to the Department, as shown by such return, provided that the amount of the tax to be deducted shall previously have been remitted to the Department by such retailer. If the retailer shall not previously have remitted the amount of such tax to the Department, he shall be entitled to no deduction hereunder upon refunding such tax to the purchaser.

Any retailer filing a return hereunder shall also include (for the purpose of paying tax thereon) the total tax covered by such return upon the selling price of tangible property purchased by him at retail from a retailer, but as to which the tax imposed herein was not collected from the retailer filing such return, and such retailer shall remit the amount of such tax to the Department when filing such return.

If experience indicates such action to be practicable, the Department may prescribe and furnish a combination or joint return which will enable retailers, who are required to file returns hereunder and also under the Retailers' Occupation Tax Act, to furnish all the return information required by both Acts on the one form.

Where the retailer has more than one business registered with the Department under separate registration hereunder, such retailer shall not file each return that is due as a single return covering all such registered businesses, but shall file separate returns monthly for each such registered business.

In his return, the retailer shall determine the value of any consideration other than money received by him in connection with the sale of any tangible personal property in the course of his business and he shall include such value in his return. Such determination shall be subject to review and revision by the Department in the manner hereinafter provided for the correction of returns.

All moneys received by the Department hereunder shall be paid into the General Revenue Fund of the State Treasury.

Section 10. When tangible personal property is purchased from a retailer for use in this State by a purchaser who did not pay the tax herein imposed to the retailer, and who does not file returns with the Department as a retailer under Section 9 of this Act, such purchaser (by the 15th day of the month following the calendar month in which such purchaser makes any payment upon the selling price of such property) shall file a return with the Department and pay the tax due upon that portion of the selling price

so paid by the purchaser during the preceding calendar month. Such return and payment from the purchaser shall be submitted to the Department sooner than the 15th of the month after the month in which the purchase is made to the extent that that may be necessary in order to secure the title to a motor vehicle under Section 4 of the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933, as amended. To the extent to which they may be pertinent, all of the provisions of Section 9 with reference to returns and payments shall be applicable to the returns and payments herein required. When a purchaser pays a tax herein imposed directly to the Department, the Department (upon request therefor from such purchaser) shall issue an appropriate receipt to such purchaser showing that he has paid such tax to the Department. Such receipt shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer.

Section 11. Every retailer required or authorized to collect taxes hereunder and every person using in this State tangible personal property purchased at retail from a retailer on or after the effective date hereof shall keep such records, receipts, invoices and other pertinent books, documents, memoranda and papers as the Department shall require, in such form as the Department shall require. For the purpose of administering and enforcing the provisions hereof, the Department, or any officer or employee

of the Department designated, in writing, by the Director thereof, may hold investigations and hearings concerning any matters covered herein and may examine any books, papers, records, documents or memoranda of any retailer or purchaser bearing upon the sales or purchases of tangible personal property, the privilege of using which is taxed hereunder, and may require the attendance of such person or any officer or employee of such person, or of any person having knowledge of the facts, and may take testimony and require proof for its information.

Section 12.—All of the provisions of Sections 2b, 4 (except that the time limitation provisions shall run from the date when the tax is due rather than from the date when gross receipts are received), 5 (except that the time limitation provisions on the issuance of proposed assessments shall run from the date when the tax is due rather than from the date when gross receipts are received), 5a, 5b, 5c (with the authority contained therein for the releasing of liens against retailers being applicable to the same extent and on the same conditions in this Act to the releasing of liens against users as well as to the releasing of liens against retailers), 5d, 5e, 5f (with the provision contained therein concerning the inclusion of the name of the "retailer" in a published notice and the provision contained therein requiring notice by registered mail to the "retailer" being applicable in this Act also to a user where the property

to which the lien applies belongs to a user), 5g, 7, 8, 9, 10, 11, 12 and 12½ in effect on the effective date of this Act, as subsequently amended, which are not inconsistent with this Act, shall apply, as far as practicable, to the subject matter of this Act to the same extent as if such provisions were included herein.

Section 13. Whenever any retailer not maintaining a place of business in this State, to whom a permit to collect the tax hereby imposed has been issued pursuant to Section 6 hereof, fails to comply with any of the provisions hereof or any orders, rules or regulations of the Department prescribed and adopted hereunder, or when the Department considers the security furnished by such retailer to be inadequate or considers that the tax can be collected more effectively from persons using such property in this State, the Department may, upon notice and hearing as herein provided, by order revoke the permit issued to such retailer. No order authorized by this Section shall be made until the retailer is given an opportunity to be heard and to show cause why such order shall not be made, and he shall be given at least 7 days' notice of the time, place and purpose of such hearing. The Department shall have the power in its discretion to issue a new permit pursuant to Section 6 hereof after such revocation.

Section 14. Any person subject to the provisions hereof who fails to file a return, or who violates any other provi-

sion of Section 9 or Section 10 hereof, or who fails to keep books and records as required herein, or who files a fraudulent return, or who wilfully violates any rule or regulation of the Department for the administration and enforcement of the provisions hereof, or any officer or agent of a corporation subject hereto who signs a fraudulent return filed on behalf of such corporation, or any person who violates any of the provisions of Sections 3, 5 or 7 hereof, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $25.00 nor more than $5,000.00, or be imprisoned in the county jail for not less than 1 month nor more than 6 months, or be both so fined and imprisoned in the discretion of the court.

Any person who violates any provision of Section 6 hereof is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $25.00 nor more than $500.00, or be imprisoned in the county jail not more than 6 months, or be both so fined and imprisoned, in the discretion of the court. Each and every day any such person is engaged in the business in violation of said Section 6 shall constitute a separate offense.

This Section shall not apply if the violation in a particular case also constitutes a criminal violation of the Retailers' Occupation Tax Act.

Section 15. The tax herein imposed shall be in addition to all other occupation or privilege taxes imposed by the State of Illinois or by any municipal corporation or political subdivision thereof.

Section 16. Appropriation to Department of Revenue, omitted.

Section 17. Appropriation to Secretary of State, omitted.

Section 18. If any clause, sentence, Section, provision or part of this Act or the application thereof to any person or circumstance shall be adjudged to be unconstitutional, the remainder of this Act or its application to persons or circumstances other than those to which it is held invalid, shall not be affected thereby. In particular, if any provision which exempts or has the effect of exempting some class of users or some kind of use from the tax imposed by this Act should be held to constitute or to result in an invalid classification or to be unconstitutional for some other reason, such provision shall be deemed to be severable with the remainder of this Act without said provision being held constitutional.

APPENDIX B

(All citations are to Commerce Clearing House All State Tax Service)

List of states which have use taxes that complement taxes on intrastate retail selling, and that require the seller to collect such tax from the purchaser (sometimes without qualification and sometimes with the qualification that this shall be done to the extent that it is possible to be done):

Alabama	CCH, Page 6231, Paragraph 63-012
Arizona	CCH, Page 6318, Paragraph 63-033
Arkansas	CCH, Page 6144, Paragraph 63-001
California	CCH, Page 6355, Paragraph 63-001
Colorado	CCH, Page 9628, Paragraph 96-034
Connecticut	CCH, Page 6171, Paragraph 63-005
Florida	CCH, Page 6111, Paragraph 64-150
Georgia	CCH, Page 6145, Paragraph 63-012
Iowa	CCH, Page 6157, Paragraph 60-425
Kansas	CCH, Page 6165, Paragraph 63-001
Louisiana	CCH, Page 6165, Paragraph 63-002
Maine	CCH, Page 6243, Paragraph 63-020
Maryland	CCH, Page 6151, Paragraph 60-401
Michigan	CCH, Page 6031, Paragraph 60-160
Mississippi	CCH, Page 6257, Paragraph 63-020
Nevada	CCH, Page 6355, Paragraph 63-002
New Mexico	CCH, Page 6262, Paragraph 63-026
North Carolina	CCH, Page 9377, Paragraph 92-702
North Dakota	CCH, Page 6063, Paragraph 63-001
Ohio	CCH, Page 6267, Paragraph 63-020
Pennsylvania	CCH, Page 9699-8, Paragraph 97-552
Rhode Island	CCH, Page 6174, Paragraph 63-030
Tennessee	CCH, Page 6183, Paragraph 63-002
Utah	CCH, Page 6221, Paragraph 63-001
Washington	CCH, Page 6219, Paragraph 63-002

West Virginia .....CCH, Page 6221, Paragraph 63-001
Wyoming .....CCH, Page 6187, Paragraph 63-021
Page 9363, Paragraph 93-036

List of states which have use taxes that complement taxes on intrastate retail selling, and that do not require (but do specifically authorize) the seller to collect such tax from the purchaser:

South Carolina .....CCH, Page 6169, Paragraph 63-025
South Dakota .....CCH, Page 9413, Paragraph 96-912
Page 6093, Paragraph 63-003

No. 470

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 470

ABBATE BROTHERS, INC., ET AL.,
Appellants,

vs.

THE CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

JURISDICTIONAL STATEMENT.

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THE SUNTHORP-WARREN PRINTING COMPANY, C. 1956

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ABBATE BROTHERS, INC., ET AL.,
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Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

JURISDICTIONAL STATEMENT.

In compliance with Rule 13 of this Court, the Appellants herewith present their jurisdictional statement, and in that behalf respectfully submit as follows:

A.

OPINION BELOW.

The opinion of the Supreme Court of Illinois, from whose judgment this appeal is taken, appears at 11 Ill. 2d 337 and at 142 N. E. 2d 691, as *Abbate Brothers, Inc., et al.* v. *City of Chicago.* The opinion is set forth in Appendix A, Page 9. The trial court judgment (Appendix A, Page 17) and Master's report (Appendix A, Page 19) are not reported in any official or unofficial reporter system.

B.

STATEMENT OF JURISDICTIONAL GROUNDS.

(i) Nature of the Proceeding.—This was an action filed to declare unconstitutional certain provisions of the Municipal Code of Chicago, requiring modifications to elevators which had been installed in conformity with the code in force at the time of their installation. Plaintiffs also sought an injunction restraining the municipality from enforcing against them the penal provisions of the amendatory ordinance. The amendatory ordinance is set forth in Appendix B, Page 34.

(ii) Date of Judgment Sought to Be Reviewed.—On May 23, 1957, the Illinois Supreme Court reversed the judgment of the Circuit Court of Cook County. Notice of Appeal was filed on July 16, 1957 in the Supreme Court of Illinois.

(iii) Statutory Provision Conferring Jurisdiction.—The jurisdiction of the Supreme Court of the United States over this appeal is conferred by 28 U. S. C. 1257 (2).

(iv) Cases Sustaining Jurisdiction.—This Court has expressly held that its appellate jurisdiction extends to cases in which the validity of a municipal ordinance has been upheld when the claim has been made that such ordinance is repugnant to the Constitution of the United States. These holdings appear in *King Mfg. Co.* v. *Augusta*, 277 U. S. 100, 114, 72 L. Ed. 801, 810, 48 S. Ct. 489; *Jamieson* v. *Texas*, 318 U. S. 413, 414, 87 L. Ed. 869, 871, 62 S. Ct. 669; and *Poulos* v. *New Hampshire*, 345 U. S. 395, 402, 97 L. Ed. 1005, 1112, 73 S. Ct. 760.

C.

QUESTIONS PRESENTED BY THE APPEAL.

Where property has been improved in compliance with the statutes in force at the time of erection of the improvement, and the operation of said improvements has been conducted over a period of many years with a comparatively low accident rate, and no grounds are advanced for any belief that the operation has become more hazardous:

1. May the legislature, without due process of law, require substantial alterations in the structure thus erected?

2. May such alterations be required solely upon the basis of the development of technological advances subsequent to the erection of the improvement?

3. If the State has such power, may it be exercised with reference to premises not accessible to the general public?

D.

STATEMENT OF THE CASE.

The 111 appellants who have joined in this appeal are the owners of 141 out of a total of 166 units comprising the South Water Produce Market District, the primary distribution center for fruits, vegetables and produce within the City of Chicago, Illinois. The units, although separated by common walls, are entirely housed within six buildings, each three stories in height. Each unit is separately owned under a cooperative plan, and has a loading platform at the front and rear on the first-floor level. The produce is stored within the units and is distributed to the different levels by freight elevators installed within each unit.

Each of the elevators is of the electric traction power freight type with hand cable control and electric magnet brake. The shaft length from basement to third floor does not exceed 33½ feet. The approximate speed of the elevators is 50 feet per minute as compared with 200 feet for most other types.

The elevators in question were installed some thirty years ago at the time of the erection of the buildings. The elevators were periodically inspected by the City and were found to comply with the existing ordinances until July 1, 1954. On that date, approval was refused because of the enactment of a new ordinance, whose validity, as applied to this situation, is here under attack.

The elevators are used by a specialized class of employee known as "hustlers" for the movement of produce within the units, and are not accessible to the public or, normally, to other employees.

The "hustlers" are specially trained and skilled in the operation of the elevators, and over the years the accident rate incident to their operation has been quite low, even when compared with elevators of more advanced types. When operated normally, the elevator gates close automatically as the car moves away from the floor, but the gates can be opened manually at any floor even though the car be elsewhere. The elevators are equipped with brakes which, when set, will prevent the operation of the elevator from any floor other than that at which the car has been stopped, although it is the practice of the "hustlers" to avoid use of the brake.

On and after July 1, 1954, the municipal inspectors denied approval to the elevators in question upon the basis of a new ordinance which provided that every existing power elevator must be equipped with locks to prevent the operation of the elevator unless the elevator doors be closed. As to the appellants' elevators, practical compliance

with the new ordinance can be accomplished by one of two methods: an interlocking contrivance can be installed at a cost of $700 per unit, but after installation, the services of a full-time elevator operator will be required at a salary estimated at about $4,000 per year for each elevator; or, in the alternative, a completely automatic system can be installed at an estimated cost of $2,400 to $2,800 per elevator.

The amendatory ordinance deprives the appellants of the use of their elevators until its provisions have been complied with.

The appellants filed an action in the Circuit Court of Cook County challenging the validity of the ordinance as applied to their situation. In their complaint, the appellants charged that the ordinance violated, *inter alia*, the appellants' rights under the Fourteenth and the Fifth Amendments to the Constitution of the United States, constituting a deprivation of appellants' property without due process of law (complaint, Abstract Page 21, Record Page 3). This contention was sustained by the trial court (Judgment, Abstract Page 56, Record Page 3). The city appealed, and appellants restated their position in their appellate brief and in oral argument on appeal. The Supreme Court of Illinois rejected the contention (Record Page 11), citing *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80, 90 L. Ed. 1096, as follows:

> "Little need be said on the due process question * * * in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws."

E.

THE QUESTIONS ARE SUBSTANTIAL.

The issue raised by this appeal may well be termed a matter of first impression in this Court. Numerous opinions have been rendered by both Federal and State Courts dealing with the propriety of the application of police power legislation to structures erected in compliance with the law existing at the time of construction. Each case has turned on its own facts, with correspondingly varied results, so that by choosing the proper excerpts, it is possible to establish almost any position one may care to take within this area of jurisprudence.

Never, however, has this Court addressed itself to the propriety of requiring substantial alterations in an improvement lawfully erected and not accessible to the general public, where the legislature has acted, not to ameliorate a demonstrated peril, but solely upon the basis of a technological advance which has been developed subsequent to the erection of the structure.

Novel devices and improvements are presently being introduced with a frequency heretofore unknown. That which is put into production today can become obsolete tomorrow. Mammoth multi-unit structures are erected, at tremendous cost, in the business districts of large municipalities, employing the most modern devices and equipment then known to science; a scant ten years thereafter the plumbing, heating, ventilating and elevator systems of such buildings may be archaic, as viewed by an overly zealous inspector in the light of subsequent industrial and scientific developments.

In the past, the producers of such new equipment have been required to sell them upon the basis of intrinsic excellence. They were able to induce customers to adopt their innovations only if they could demonstrate in open

competition, the obvious and compelling superiorities of the new contrivance over the old.

If the position of the defendant municipality in this litigation be sustained, it will henceforth be necessary for the promoter of a new device to sell his wares in the legislative market only. If the promoter can convince a legislative body of the necessity for installation of his innovation, it will be unnecessary to address himself to any other market, for the simple reason that legislative fiat will compel purchase and distribution of his commodity.

Even less happily, should a legislative body be not altogether convinced of the overriding necessity for modification of existing structures according to the nature of the contrivance, nevertheless, if bent upon mischief, the legislators may still create for the entrepreneur the market which his commodity could never find on its own merit.

The most significant distinction between a republic and other forms of government is the concept that rights of citizens are not dependent upon the whim of the individuals charged with the duties of public office. It is essential to the maintenance of this concept that there be some point at which the legislative determination of the necessity for interference with existing property rights, shall be not binding upon the courts. If that point be not reached in this case, it is hard to see how it can ever be found. If the position of the defendant municipality be sustained in this action, no property right of any citizen can have any value other than may from time to time be assigned to it by the controlling legislative body.

In the instant case, the municipality has proceeded under the guise of the police power. No question of the general welfare is involved; the elevators owned by the appellants are used only by special employees trained and experienced in their use. No special peril has ever been suggested; at the time of the hearing, the 141 elevators owned by appel-

lants had been operated for more than *eighteen years* without an accident. The conclusion is inescapable that the legislative body of the City of Chicago has not intervened here in behalf of the general public welfare. The sole beneficiary will be the purely private interest of the promoters of the device.

The Fourteenth Amendment to the Constitution of the United States provides that "no State shall * * * deprive any person of life, liberty or property, without due process of law * * *." In the face of this clear prohibition, the State of Illinois, acting through the defendant municipality, has told the appellants that they may not use their structures for the purpose for which they have been erected unless they first make their peace with the developers and vendors of the contrivance prescribed by the ordinance.

The Illinois Supreme Court justifies this abridgement of constitutional rights by citing *Queenside Hills Realty Co. v. Saxl*, 328 U. S. 80, 90 L. Ed. 1096, which dealt with the requirement of installation of sprinkler systems in lodging houses to reduce fire hazard. That case simply provides no analogy. Certainly, there is an area within which the overwhelming necessity for the protection of the public welfare justifies a legislative intrusion upon constitutional rights. But unless legislative abridgment of constitutional rights be held within that area, these rights rapidly will be dissolved.

Respectfully submitted,

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APPENDIX A.

Opinion of the Supreme Court of Illinois.

Mr. JUSTICE DAILY delivered the opinion of the court:

This appeal, prosecuted by the city of Chicago and duly certified to this court by the trial judge, is from a judgment of the circuit court of Cook County which declared unconstitutional and void sections 79—1.4 and 79—106 of the Municipal Code of Chicago, insofar as they require the installation of certain safety devices on elevators owned or operated by appellees.

The record reveals that the 111 appellees own 141 separate units, out of a total of 166 units, housed in six buildings comprising the South Water Produce Market District, a distribution center for fruits, vegetables and produce. Each building is three stories high and has a common roof and basement; the units within the buildings are separated by common walls, are 80 feet deep, and having loading platforms at front and rear on the first floor level. Each unit is separately owned under a co-operative plan and appellees, or their tenants, conduct their businesses from one or more units. Merchandise they buy and sell is stored in the buildings and is distributed to the different levels by means of freight elevators.

Each of the units here involved is improved with an elevator of the same type, viz., an electric traction power freight elevator with hand cable control and electric magnet brake, which travels upwards and downwards in a shaft or hoistway a maximum distance of 33 feet 5½ inches, (from basement to third floor,) at an approximate speed of 50 feet per minute. These are electric-worm gear elevators and all were installed when the buildings were erected some 30 years ago. The electric motor for each elevator is set

in a housing located at the top of the shaft; the elevator car is suspended on cables. Power is actuated by a continuous cable which runs in two lines along the side of the shaft from its top to its bottom, a hand pull on either of these ... es being sufficient to engage the power and to cause movement in the direction desired. Between the two control lines there is suspended a center line rope which brakes the elevator when pulled downward and it appears that all three of the said lines, or ropes, hang about three feet from the front of the shaft.

There is an opening into the shaft at each level of the building. Those at the first, second and third floor levels have gates which are horizontal sliding panels, center bi-parting, the halves sliding away from one another in a vertical plane. Such gates, or doors, are either wire mesh or solid metal, the latter type having a glass panel in the upper half which permits vision into the shaft. When operated normally the gates close automatically as the car moves away from the floor, but they can be opened manually at any floor even though the car is not at that floor. Because of this feature of the doors and the proximity of the control cables to the front of the shaft, it is possible to reach into the shaft and control the operation of the elevator from any level regardless of the location of the elevator. This cannot be done if the brake is set on the elevator but the practice of appellees' employees is to leave the brake unlocked, thus permitting exterior operation from any level. As a result the car may be removed from a level without the knowledge of the employee who took it there, the open doors leave the shaft unguarded, and employees leaning in to reach the controls must maneuver in time to avoid the moving car. At the basement level the shaft doors are of solid steel, hinged on the side and center bi-parting, and also serve as fire doors.

Appellees' elevators were periodically inspected by the

city and were found to comply with existing ordinances up to July 1, 1954. After that date approval was refused and appellees were served with notice to make changes, alterations and repairs necessary for compliance with section 79—1.4 of the Municipal Code. This section was first enacted July 16, 1952, and provided as follows: "On or before July 1, 1953, every existing power elevator shall be equipped (or such equipment shall have been contracted for) with hatchway door interlocks of the hoistway unit system type which shall comply with all provisions of this chapter." Other provisions of the chapter defined a hatchway door interlock as a device "to prevent the operation of the machine to move the car away from a landing unless the hatchway door at the landing is in a closed and locked position; and to prevent the opening of the hatchway door from the landing side except by special key, unless the car is at rest within the landing zone, or is coasting through the landing zone, with its operating device in a stop position." A hoistway unit interlock system is defined as: "An interlock system which will prevent the operation of the car unless all hatchway doors are locked in a closed position." Such devices would not permit the method of operation practiced by appellees and their employees.

On July 28, 1954, section 79—1.4 was amended to provide that: "On or before July 1, 1954, every existing power elevator, except rope-gearded hydraulic elevators, steam elevators and gravity elevators (friction) shall be equipped with hatchway door interlocks of the hoistway unit system type which shall comply with all the provisions of the chapter." Shortly after the latter enactment, appellees, who had not complied with the original ordinance, commenced this proceeding for a declaratory judgment that the amended ordinance is an improper exercise of the police power which deprives them of their property without due process of law, that the classification which serves to except certain types of elevators is discriminatory and unconstitu-

tional, and that the ordinance is unreasonable and void insofar as it applies to their elevators.

The master, who heard the evidence in the cause, concluded from principles established by the decisions of this court that the city had the power both to pass the ordinance and to give it retroactive effect, and that it was a reasonable and proper exercise of the police power. However, because he could see no reasonable basis for excluding the excepted types from its operation, he concluded section 79—1.4 created an arbitrary and discriminatory classification which rendered it void. The trial court, by a judgment entered July 19, 1956, concurred with the latter conclusion of the master, but held in addition that the retrospective application of the ordinance was an improper exercise of the police power, that it was confiscatory and void as applied to appellees' elevators, and that the resulting public benefits did not justify the damage and burden to appellees. The court refused to consider a supplemental pleading filed July 13, 1956, which set forth that a further amendment to section 79—1.4 had been introduced before the city council, and which prayed that the cause be continued for a reasonable time pending the disposition of the proposed amendment.

The parties agree in the briefs filed in this court that, two months after the entry of the judgment, the city council adopted the proposal referred to and amended section 79—1.4 by the addition of the following paragraph: "On or before July 1, 1958, every existing rope-geared hydraulic elevator, steam elevator and gravity elevator (friction) shall be equipped with hatchway door interlocks of the hoistway unit system type which shall comply with the provisions of this chapter." This amendment thus removed the arbitrary classification found to exist when this proceeding was decided. Citing *People ex rel. Toman* v. *Mercil & Sons Plating Co.*, 378 Ill. 142, and *La Salle Na-*

tional Bank v. *City of Chicago*, 3 Ill. 2d 375, which are indeed controlling, the city correctly contends the issue relating to arbitrary classification has become moot rendering unnecessary its review by this court. Appellees concede that the issue raised by the ordinance as it existed at the time of judgment has become moot, but argue that the amendment creates a new discrimination in that owners of hydraulic, steam and gravity elevators are given more time to "depreciate" their equipment, and to install the required devices.

Little merit can attach to the present contention of appellees. Nothing in the record supports the charge that the amendatory paragraph added in 1956 was for any purpose other than a legitimate exercise of the police power directed at protecting human life. On the other hand it is shown that hydraulic, steam and gravity elevators, not being powered by electricity, require more extensive conversion to permit compliance with the ordinance, thus causing need for a greater period of time in which to comply. Under the latter circumstance it must be said there existed a reasonable basis for the legislative distinction complained about. We conclude that the issue of an arbitrary classification between elevators became moot with the amendment of 1956, and that the distinction made in such amendment has a reasonable basis.

Appellees concede the regulation of elevators is a field in which the city has been granted authority to exercise its police power, (See: *Marcovitz* v. *Hergenrether*, 302 Ill. 162,) and agree that section 79—1.4 is perhaps valid when applied to elevators installed in the future. They insist, however, as the trial court found, that its retroactive application to their elevators is an improper exercise of the police power, which is both oppressive and unreasonable.

The power of a governmental body to require changes in existing structures for the protection of health and safety

is the subject of an annotation found in 109 A.L.R. 1117. From the cases there analyzed, and from observations found in 62 C.J.S., Municipal Corporations, sec. 149, the general rule appears to be that while regulations restricting the use of property do not ordinarily have retroactive effect, municipal corporations in the exercise of their police power may, within reasonable bounds, enact ordinances or regulations having such effect. Any definition of the criterion "within reasonable bounds" is of course circumscribed by the facts of each situation, but all authorities are agreed it must appear that the public welfare demands retroactive application, and that the property owners affected do not suffer unreasonable exactions as contrasted with the resulting public benefits.

The application of the foregoing principles has produced varied but consistent results within our own jurisdiction. In *Masonic Fraternity Temple Assn.* v. *City of Chicago*, 131 Ill. App. 1, the court, while saying it could easily conceive of circumstances with respect to physical, social or municipal conditions in which a municipality, in the exercise of properly granted police power, might require existing buildings to be altered to a reasonable degree, refused to give retroactive application to an ordinance requiring additional stairways in buildings of a certain capacity, when it appeared that its effect would be to compel the plaintiff, at great expense and loss of income, to practically demolish and rebuild a nineteen-story structure which had previously complied with all building regulations. On the other hand our courts have found it within reason to give retroactive effect to ordinances requiring: (1) the installation of asbestos curtains and other fire prevention devices in theaters, (*Clarke* v. *City of Chicago*, 159 Ill. App. 20); (2) the installation of fire sprinkling systems in buildings housing sick and infirm, (*City of Chicago* v. *Washingtonian Home of Chicago*, 289 Ill. 206); and (3) the installation of handrails on all stairways in certain types of buildings. *O'Don-*

nell v. *Barach*, 1 Ill. App. 2d 157; *Doran* v. *Boston Store of Chicago*, 307 Ill. App. 456; *DeWolf* v. *Marshall Field & Co.*, 201 Ill. App. 542.

Looking to other jurisdictions we find it was held not unreasonable in *Adamec* v. *Post*, 273 N.Y. 250, 7 N.E. 2d 120, to give retroactive effect to a regulation requiring the installation of more modern sanitary and safety facilities in a case where the alterations in a building assessed at $13,500 would cost $5000. In *City of Seattle* v. *Hinckley*, 40 Wash. 468, 82 Pac. 747, described as a landmark case in the field, an ordinance requiring new type fire escapes on all hotels, office buildings, factories, etc., more than three stories high, was held applicable to existing structures even though some were equipped with fire escapes of a different kind. After stating the public had a right to the safest method of protection that could be found and determined by the municipality, and that the latter had a duty to provide for it, the court concluded: "It would be a sad commentary on the law, if municipalities were powerless to compel the adoption of the best methods for protecting life in such cases simply because the confessedly faulty method in use was the method provided by law at the time of its construction." Similar sentiments were expressed by our nation's highest court in *Queenside Hills Realty Co.* v. *Saxl*, 328 U.S. 80, 90 L. ed. 1096, where a New York law requiring the installation of sprinkler systems in existing lodging houses of nonfireproof construction was held constitutional. The court said: "Little need be said on the due process question. We are not concerned with the wisdom of this legislation or the need for it. [Citation] Protection of the safety of persons is one of the traditional uses of the police power of the States. Experts may differ as to the most appropriate way of dealing with fire hazards in lodging houses. Appellant, indeed, says that its building, far from being a fire-trap, is largely fireproof; and to the extent that any fire hazard exist, they are adequately safe-

guarded by a fire alarm system, constant watchman service, and other safety arrangements. But the legislature may choose not to take the chance that human life will be lost in lodging house fires and adopt the most conservative course which science and engineering offer. It is for the legislature to decide what regulations are needed to reduce fire hazards to the minimum * * * But in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws." 328 U.S. at pp. 82-83, 90 L. ed. at p. 1098.

Although appellees have alleged their elevators are "consistent with the highest standards of health and safety," and have proved compliance with past ordinances, as well as a comparatively low death and accident rate, such factors are no bar to the exercise of the police power granted to the city, nor do they render a requirement for new safety devices oppressive and unreasonable. Based upon advances in engineering, and no doubt upon experience gained during the thirty years appellees' elevators have been in operation, the city has determined that the greatest protection to human life is to be realized by door interlocks which will prevent the operation of elevators unless hatchway gates are closed, and permit the gates to open only when the elevator car is at the gate level. In requiring all power elevators to be so equipped the city has done no more than to exercise its continuing power to make regulations needful to the common good and general welfare, subject to which all property is held. As pointed out in *Clarke* v. *City of Chicago*, 159 Ill. App. 20, the safety of persons using structures or equipment which antedate new protective devices is just as important as the safety of those using subsequently built structures. Because of expert testimony stating it is possible for one with the skill and knowledge to render the interlocks inoperative, thus permitting a return to the old methods of operation, appellees contend the

ordinance will not achieve the protection desired. The possibility that someone will unlawfully defeat the purpose of the ordinance is no test of its reasonableness, nor should it serve to deny those who come onto appellees' property, or use the elevators, of the added protection to which they are entitled. We conclude, even without adverting to the need for correcting the dangerous practices which attend the operation of appellees' elevators, that the retrospective application of the ordinance is both a reasonable and proper exercise of the police power.

For its concluding point the city argues, and we find correctly so, that the trial court erred when it held section 79—106 of the Municipal Code to be void and unenforceable against appellees. It is fundamental that a judgment order must be supported by allegations in the complaint as well as by the evidence. (*Stowell* v. *Satorius*, 413 Ill. 482; *Leitch* v. *Sanitary District of Chicago*, 386 Ill. 433.) The portion of the judgment order relating to section 79—106 does not meet this test.

The judgment of the circuit court of Cook County is reversed.

Judgment reversed.

Judgment of the Trial Court.

This cause coming on to be heard upon the pleadings, proofs taken before a Master in Chancery upon stipulation of the parties, the Master's Report containing his conclusions of facts and law, the exceptions of the parties to said Master's Report, and the arguments of counsel; and the Court having jurisdiction of the parties and of the subject matter, it is HEREBY ORDERED, ADJUDGED AND DECLARED by the Court as follows:

1. Upon motion of defendant, leave be and the same

is hereby granted to file instanter its Supplemental Pleadings.

2. Upon motion *ora tinus* of plaintiffs to strike said Supplemental Pleadings, it is hereby ordered that said Supplementary Pleadings be and the same is stricken as being insufficient in law.

3. There exists an actual controversy between the parties.

4. Section 1.4 of Chapter 79 of the Ordinance of the City of Chicago contains an unlawful classification and is void and unenforceable as to Plaintiffs.

5. Section 1.4 and Section 106 of Chapter 79 of the Ordinances of the City of Chicago do not bear any substantial relation to the public health, safety, comfort, morals and welfare in their retroactive application to the existing elevator installations of the plaintiffs.

Applied retroactively to said existing elevator installations of plaintiffs, said ordinances deprive plaintiffs of the use of their property without due process of law, and are confiscatory and oppressive.

The benefit to the public arising out of the retroactive application of said ordinances to the elevator installations of the plaintiffs is conjectural or slight when compared with the damage to and burden upon the plaintiffs.

Section 1.4 and Section 106 of Chapter 79 of the Ordinances of the City of Chicago are void and unenforceable, as applied to plaintiffs.

The Court certifies that the issues in this cause involves the validity of municipal ordinances and that the public interest requires that if an appeal be prayed from the judgment of this Court, said appeal be taken directly to the Supreme Court of the State of Illinois.

Master's Report.

I, Jacob Shamberg, one of the Masters in Chancery of the Circuit Court of Cook County, to whom the above entitled cause was heretofore referred to take proofs of the respective parties and to report my conclusions of law and fact, after having first given notice to said parties, respectively, of the time and place where said proofs would be taken, and causing to come before me all such witnesses as the respective parties hereto desired, said witnesses having been examined severally on oath and their testimony having been reduced to writing, now report, as follows:

I.

Jurisdiction.

The Court has jurisdiction of the subject of this cause and of the parties hereto, and there is an actual and justiciable controversy between the parties.

II.

Nature of Action.

The present proceedings are for a declaratory judgment that Section 1.4 of chapter 79 of the Municipal Code of the City of Chicago is void or inapplicable to elevators owned or operated by the plaintiffs, respectively.

Section 1.4 reads:

> "On or before July 1, 1954, every existing power elevator, except rope-geared hydraulic elevators, steam elevators, and gravity elevators (friction) shall be equipped with hatchway door interlocks of the hoistway unit system type which shall comply with all the provisions of this chapter."

III.

Findings.

From the pleadings and competent evidence, I find:

1. The plaintiffs, respectively, are the owners of 141 units (of a total of 166) in six buildings located on South Water Market Street in the City of Chicago in the area bounded by 14th Place on the north, 15th Street on the south, Racine Avenue on the west and Morgan Street on the east.

2. The area is commonly known as the South Water Produce Market District and is the center of distribution for fruits, vegetables and produce.

3. The units are subdivisions of six buildings, each building having a common roof and three stories and a basement, and each unit being separated from others by common walls. Each unit is 24 feet wide and approximately 80 feet deep and has a loading platform at the front and one at the rear. The businesses of the individual plaintiffs or their tenants are conducted within respective separate units, some of the businesses occupying two or more units.

4. The South Water Market District was planned, and its buildings constructed about 30 years ago, as a produce market, and the units involved are used generally for the operation and maintenance of wholesale fruit, vegetable and produce businesses.

5. Each unit here involved contains the same type and size of elevator, viz., one electric traction power freight elevator with hand cable control and electric solenoid (electric magnet) brake, which travels upward and downward, in a hoistway (hatchway) a maximum distance of 33 feet 5½ inches (from basement to third floor) at a speed of approximately 50 feet per minute. These are electric worm gear elevators.

The motive power for each elevator is located at the top of the hatchway and the car is suspended from cables which move it up and down. The motive power is actuated by a continuous cable which runs from the top of the hatchway to the bottom of the hatchway along side of the car, in two lines. A hand directional movement of either line actuates the control and causes movement. Between these two lines there hangs a center line rope which applies the brake when pulled downward. These cables are inside of the hatchway at one side and about three feet from the front of the hatchway. Each elevator is located at the rear of each unit. There is an opening into the hoistway at each level of the building. The openings at the first, second and third floor levels have gates which are horizontal sliding panels, center bi-parting, the halves sliding away from one another on vertical plane. These doors or gates are either wire mesh or solid with glass in the upper panel which permits vision into the hatchway. The latter type is known as the "Meeker" type. These gates, when in normal operating order, close automatically as the elevator car moves away from the floor, but can be opened from the exterior by hand pressure at any floor, even though the car is not at that floor. At the basement level there are solid steel doors, center bi-parting vertically, the halves being hinged at the side. The latter doors are also fire doors. These doors do not close with the movement of the car.

6. Each unit has a stairway located midway between the front and rear of the unit, and the stairway runs from level to level. There is also a stairway from the outside sidewalk (loading dock) down to the basement.

7. These elevators are generally operated by employees of the occupants, freight handlers known in the trade as "porters" or "hustlers." The practice is to have these "hustlers" use these elevators in connection with the trans-

fer of produce on hand trucks from the exterior of a unit into the unit and from floor to floor. In each instance several (two or more) "hustlers" use the same elevator during the same working period and they do so alternately. The following illustrates the typical operation:

Assuming that an elevator is at the third floor level and that the "hustler" who took it there has removed his hand-truck to some part of the third floor and is away from the elevator, a "hustler" at another level opens the doors at that level, looks for the car and yells, up or down the shaft depending where the car is, for permission to move it. Upon assent, vocal or silent, the second "hustler" reaches into the hatchway and pulls the nearest cable, upward to move the car downward and downward to move the car upward. When the car reaches his level and while it is moving, he reaches into the hatchway and grabs a hand center line rope which hangs from the machinery located at the top of the hatchway and travels through a course attached to the car, and pulls that rope and thus causes the application of the brake and the halting of the car. The second "hustler" cannot cause the car to move if the first "hustler" has applied a hand cable lock (located in the car), the function of which is to grip one of the cables and prevent the cable from being moved and thus prevent actuation of the motive power of the elevator. If the first "hustler" has not applied the hand cable lock or if it does not hold properly, the car may be moved away from his location by the above remote operation.

8. The elevators are generally operated only by "hustlers" and there is no evidence establishing any practice that the public or any persons (other than "hustlers") generally are carried on such elevators, although occasionally a customer will accompany a "hustler." However, the floor areas near the hatchway, especially the first floor area, appear to be accessible to others than the "hustlers."

9. Insofar as the record in this cause discloses, the accident history of the South Water Market is good when considered in relation to 30 years' operation of 141 elevators, the number of casualties shown here to have occurred is only five (two fatal), the last having occurred about 18 years ago.

A tabulation of accidents reported to the City Elevator department for the period from 1940-1955 shows none reported as having occurred at the South Water Market, and shows with reference to different types of elevators the following totals:

E. W. G. Freight	167
E. W. G. Passenger	124
Gearless Passenger	17
Rope Geared Hydraulic Passenger	11
E. D. W. G. Freight	8
E. B. W. G. Freight	7
Hydraulic Freight	7
Hand Power Freight	6
Rope Geared Hydraulic Freight	3
Gearless Freight	2
E. W. G. Manlift	2
Hydraulic Lift	2
Hydraulic Passenger	1
E. D. W. G. Passenger	2
E. W. & S. G. Freight	1
Steam Freight	1
Friction Freight	1
S. B. S. G. Freight	1
Hydraulic Sidewalk Freight	1
E. W. G. Service	1
Empty Hatch	1
(E. W. G. indicate electric worm gear elevators)	
Total	366

The records of the city department do not indicate the number of accidents occurring on hand cable operated elevators.

10. The elevators at the Market were originally installed by the Reliance Elevator Company which has since kept a service force at the Market, and, under contract, it makes regular inspections and tests of the elevators and renders services and makes repairs as necessary.

11. These elevators have been inspected periodically by the City Elevator Department of the City of Chicago and have been approved as complying with city ordinances up to July 1, 1954. Thereafter the said department refused to approve the elevators and served notice that changes, alterations and repairs were necessary in order that the elevators be made to comply with section 79-1.4 of the Municipal Code.

12. Section 79-1.4 (a new provision) was adopted by the City Council on July 16, 1952, in the following form, viz.,

> "On or before July 1, 1953, every existing power elevator shall be equipped (or such equipment) shall have been contracted for with hatchway door interlocks of the hoistway unit system type which shall comply with the provisions of this chapter."

13. Thereafter on July 28, 1954, the said section was amended to provide (as it does now) that:

> "On or before July 1, 1954, every existing power elevator, except rope-geared hydraulic elevators, steam elevators, and gravity elevators (friction) shall be equipped with hatchway door interlocks of the hoistway unit system type which shall comply with all the provisions of this chapter."

14. In section 79-2 of the Municipal Code there are found, the following pertinent definitions:

> "*Elevator.* A raising and lowering mechanism equipped with a car or platform which moves in guides in a substantially vertical direction, further defined as the following types:
>
> "(d) Electric elevator. An elevator operated by

an electric motor directly applied to the elevator machinery.

"(e) Freight elevator. An elevator designed for carrying freight and the operator and persons necessary for loading and unloading.

"(f) Gravity elevator. An elevator in which gravity is the source of power.

"(h) Hydraulic elevator. An elevator operated by liquid under pressure.

"(1) Plunger elevator. A hydraulic elevator having a ram or plunger directly attached to the under side of the car platform.

"(2) Rope geared hydraulic elevator. A hydraulic elevator in which the movement of the car is obtained by multiplying the travel of a piston or ram by a system of sheaves over which the hoisting ropes operate.

"(i) Passenger elevator. An elevator which is designed to carry persons.

"(j) Power elevator. An elevator operated otherwise than by gravity or manually.

"(n) Steam elevator. An elevator operated by a steam engine directly applied to the elevator machinery.

"*Hatchway.* The space in which an elevator or dumbwaiter is designed to operate.

"*Hatchway door or gate.* The hinged or sliding portion of the hatchway inclosure for access to the car at any landing.

"*Hatchway door interlock.* A device, the purpose of which is to prevent the operation of the machine to move the car away from a landing unless the hatchway door at the landing is locked in the closed position; and to prevent the opening of the hatchway door from the landing side except by special key, unless the car is at rest within the landing zone, or is coasting through the landing zone with its operating device in the stop position.

"(a) Door unit interlock system. An interlock system which requires that the hatchway door at which the elevator is standing must be locked in the closed position before the elevator can leave the landing, but which does not prevent the operation of the car if other doors in the hatchway are not locked.

"(b) Hatchway unit interlock system. An interlock system which will prevent the operation of the car unless all hatchway doors are locked in the closed position.

"*Hatchway enclosure.* Any structure which separates the hatchway, either wholly or in part, from the floors or landings through which the hatchway extends.

"*Hatchway unit contact system.* A contact system which will prevent the operation of the car unless all hatchway doors are closed.

"*Machine.* The machinery and its equipment used in raising or lowering the car or platform, of the following types:

"(a) Direct-drive machine. A machine in which the power is transmitted directly to the driving sheave or sheaves without intermediate mechanism or gears.

"(b) Spur-geared machine. A machine in which the power is transmitted to the driving sheaves or drum through spur gearing.

"(c) Traction machine. A machine in which the movement of the car and counterweight is obtained by means of traction between the driving drum, sheave or sheaves and the hoisting cables.

"(d) Winding drum machine. A machine in which the cables are fastened to and wind on a drum.

"(e) Worm-geared machine. A machine in which the power is transmitted to the driving sheaves and drum through worm gearing.

15. The elevators at the Market are power elevators as are rope geared hydraulic elevators, steam elevators and gravity elevators (friction), and all travel in hoistways and have openings at floor levels.

16. A rope geared hydraulic elevator has no electric brake, and is operated either by a direct hand-pull cable (as are the subject elevators) or by a lever inside the car which controls the operating cable through a series of "sheaves" directly underneath the car on which an operating cable is roped. This cable is known as the "tiller" rope. "Sheaves" are grooved wheels on which the cables

are wound. There is no electric brake on such an elevator. Elevators of this type having a lever in the car require an operator inside of the cab to move the car.

A rope geared hydraulic elevator which is hand cable controlled operates in the same manner as the elevators at the market, can be operated from outside of the car, and "hustlers" could make alternate use of such a rope geared hydraulic elevator as they are making of the elevators at the market, i. e., the car could be moved from another level through the cables.

17. A steam elevator is controlled by an operator in the car by movement of a lever hanging from the top of the car, and cannot be operated from outside of the car. Such elevators do not have electric brakes.

18. A gravity elevator (friction) descends without power and rises by friction applied to a continuously running belt moved by electrical power. This requires an operator within the car to move the controls so as to engage the belt for upward movement and to disengage the belt for downward movement. For upward movement two cars may rely upon the same moving belt. Such elevators do not have electric brakes.

19. As indicated above, the subject elevators are electric traction, moving upward and downward by force applied directly to the machinery, are hand cable operated and may be controlled from outside of the car. They have electric magnetic brakes.

20. "Hatchway door interlocks of the hoistway unit system" contemplate a device, the purpose of which is to prevent the operation of the machine to move the car away from the landing unless the hatchway door at that landing is in a closed position and unless all hatchway doors are locked in the closed position.

21. The interlock system depends on electrical control

of the movement of the elevator and can be applied to the elevators at the Market since they are electric traction elevators, but the application of an interlock system to rope geared hydraulic elevators, steam elevators and gravity (friction) elevators cannot be made since there is a complete absence of electrical control in the case of the rope geared and steam elevators and partial absence in the case of the gravity (friction) elevator (and even if an electrical controls could be devised for steam and gravity elevators the change would be so material as to require completely new elevators under City Code provisions which apply in the event of major alterations but not otherwise).

22. The application of an interlock system to the elevators at the South Water Market will, under the view of the plaintiffs, prevent the alternate use of an elevator by several "hustlers" since a "hustler" on a landing where the car is not situated could not move the car to his level since he cannot open the gates at his level because of the interlock, even though all other gates are closed. If he does open the gates by a special key, he interrupts the electrical circuit and cannot move the car anyway. However, it seems that a "hustler" could, without opening the gates at his level, through a handhole in the side of the hatchway where the handcables may be reached, move the car, provided that he has obtained clearance from the other "hustler" who has the car and provided that other "hustler" has closed the gates at his floor. The efficiency or safety of such an operation was not shown in the record here.

23. "Interlocks" may be plugged and this may be done by one person without the knowledge of others making use of the elevator, and the others, relying on the interlocking system being in operation, may be misled by trying to open gates and having the gates open without the car being at the floor. However, there are indications that the "inter-

locks'' could be so placed in a hoistway or so covered as not to be accessible. Properly installed and not tampered with, ''interlocks'' are an additional safety factor.

24. The installation of interlocks would require the installation of electrical sequence relays, the definition of which does not seem to be important here, and the total cost of such an installation (interlocks and relay) is estimated at about $700.00 per car.

25. The plaintiffs take the view that they cannot operate their elevators for their businesses with the installation of ''interlocks'' and that they will be forced either to install ''continuous-pressure'' operating cars which operate with ''up'' and ''down'' buttons or an ''up'' and ''down'' switch in the car and at each landing, except the terminal landings, at each of which there may be one button or switch, any one of which may be used to control the movement of the car in the direction for which the button is pushed or the switch actuated, but only so long as the button or switch is manually held in the operation position (landing stops are not automatic) at an estimated cost of $2400.00 per elevator; or ''automatic'' operating cars which operate by means of buttons or switches, both in the car and at the landings, the momentary pressing of which will cause the car to start and stop automatically at the floor corresponding to the button pushed, at an estimated cost of $2800.00.

26. An alternative to continuous pressure or automatic operation with interlocks is the employment of a full time elevator attendant at a salary estimated at about $4000.00 per year.

27. The records of the City Elevator Department show that there are 7286 electric freight elevators in the City of Chicago, but these records do not show how many of these 7286 elevators are of the hand cable operated type such as found at the South Water Market District.

28. These records show that there are 119 rope geared hydraulic elevators in the City of Chicago (66 passenger, 49 freight and 4 combination); 24 steam elevators (2 passenger and 22 freight); and 93 friction elevators (all freight).

IV.

Principles of Law Involved.

1. Municipal corporations can exercise only delegated powers, and in the absence of express statutory provisions to that effect courts are not authorized to indulge in any presumptions in favor of the existence of the power. (*Biffer* v. *City of Chicago*, 278 Ill. 562, 569.)

2. The power to pass an ordinance like the one in question here is implied, however, from the provisions of the Sections hereinafter mentioned. Section 23-105, Chapter 24, gives the City Council the power to pass and enforce all necessary police ordinances. Section 23-61 gives it the power to declare what shall be a nuisance and to abate the same. Section 23-81 authorizes it to do all acts and make all regulations which may be necessary or expedient for the promotion of health. These sections together with section 23-105 which gives the City Council authority to pass and enforce all necessary police ordinances authorize a City to make any regulations concerning elevators necessary for the promotion of the safety and health of its inhabitants. (Cf. *Marcovitz* v. *Hergenrether*, 302 Ill. 162, 168, involving an ordinance concerning protection of elevator hoistways, etc.)

3. The existence of the City's power to legislate on the subject matter of the ordinance in question being established, the ordinance is presumed to be reasonable (*Ferguson Coal Co.* v. *Thompson*, 343 Ill. 20) and the next inquiry is whether the ordinance is a reasonable exercise of the power. (*Fr. Basil's Lodge* v. *City of Chicago*, 393 Ill. 246.)

4. Whether there exists any connection between a given ordinance and the police power claimed to be exercised thereby, and whether such ordinance is a proper exercise of such power or whether the ordinance is unreasonable and arbitrary, are primarily questions for legislative determination. The City Council is the judge, in the first instance, of those matters, and unless the exercise of its judgment and discretion is manifestly unreasonable, the courts will not declare the ordinance invalid. (*Fr. Basil's Lodge* v. *City of Chicago*, 393 Ill. 246, 257.)

5. The party attacking an ordinance as an unreasonable or oppressive exercise of the police power, has the burden to affirmatively and clearly show wherein the unreasonableness exists (*Chicago* v. *Washingtonian Home*, 289 Ill. 206, 213) and where there is a difference of opinion the court will accept and abide by the legislative determination (*Midland Elec. Coal Corp.* v. *Knox County*, 1 Ill. 2nd 200).

6. There is no inherent or vested right in property owners which prevents the City Council from passing an ordinance under the police power which is applicable to existing structures even though the structures complied with the law in force at the time the structures were built. (*Clarke* v. *City of Chicago*, 159 Ill. App. 20.)

7. Ordinances must be uniform, fair and impartial in their operation, must be reasonable and not arbitrary, must not discriminate against those of the said class, and must apply to all of a class. (*Fr. Basil's Lodge* v. *City of Chicago*, 393 Ill. 246, 258.) Where statutes are enacted in the exercise of the police power, only those statutory classifications are valid which are based on reasonable grounds of distinction with reference to the object of the legislation (*Northern Ill. Coal Corp.* v. *Medill*, 397 Ill. 98, 106-107), and if there is no reasonable grounds for distinction, then the exception is invalid and the entire ordinance is invalid (*Chicago Park District* v. *Canfield*, 382 Ill. 218, 225).

V.

Conclusions.

1. The City Council had the power to pass section 79-1.4 of the Municipal Code, concerning interlocks, and to make it retroactive in application. It is to be remembered that "hustlers" are members of the public to be protected.

2. There is no evidence to overcome the presumption that there was a reasonable exercise of police power in requiring interlocks. (Even the elevator expert testifying for the plaintiffs, considered interlocks to be an additional safety device if not tampered with, although there is a difference of opinion between him and experts testifying for the City as to whether interlocks can be tampered with. The Court cannot substitute its opinion for that of the City Council that interlocks are necessary, however.)

3. The application of the ordinance to the elevators of the plaintiff is unreasonable, however, because the ordinance excepts "rope-geared hydraulic elevators, steam elevators and gravity elevators (friction)" which are all power elevators travelling vertically in hoistways with openings at floor landings and are similar in movement and exposure to the same dangers as are the plaintiff's elevators. (It is to be noted that an elevator expert testifying for the City of Chicago in favor of the application of interlocks saw no reason to exclude rope geared hydraulic elevators from the requirements.)

4. The ordinance creates an unlawful classification, discriminating in its nature, which renders the ordinance invalid. There is no reasonable ground upon which this classification can be made. It bears no relation to the object and purposes of the ordinance, its only effect is to permit elevators in the excepted category to escape the ordinance even though doors to their hoistways may be opened while elevator cars are moving and the public safety

thereby endangered. Since public safety requires "interlocks," it is discriminatory to exclude any elevators whatsoever, and to impose sanctions on the plaintiffs and not on the owners of buildings having elevators of the excepted category. To grant the latter immunity from the operation of the ordinance is to deny the equal protection of the law to the plaintiffs.

5. Even though the owners of the other elevators may be forced to expend more money than the plaintiffs, this difference is no concern of the City Council and no basis for classification since public safety does not concern itself with the pocketbooks of the individuals required to expend money to meet the requirements.

VI.

Recommendation.

I recommend that the Court enter a judgment declaring that the City Council has the power to pass the ordinance in question but that the ordinance is unenforceable and void because it contains an unlawful classification.

APPENDIX B.

Ordinance of the City of Chicago.

"On or before July 1, 1954, every existing power elevator, except rope-geared hydraulic elevators, steam elevators, and gravity elevators (friction) shall be equipped with hatchway door interlocks of the hoistway unit system type which shall comply with all the provisions of this chapter."

"On or before July 1, 1958, every existing rope-geared hydraulic elevator, steam elevator and gravity elevator (friction) shall be equipped with hatchway door interlocks of the hoistway unit system type which shall comply with the provisions of this chapter.

SECTION 2. This ordinance shall be in force and effect from and after its passage and due publication."

(Additional pertinent sections of the Municipal Code of Chicago, including definitions of the terms employed in the ordinance are fully set forth within the Master's Report, Appendix A, Pages 24-26.)

No. 470

Office - Supreme Court, U.S.
FILED
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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 470

ABBATE BROTHERS, INC., ET AL.,
Appellants,

vs.

THE CITY OF CHICAGO, A MUNICIPAL CORPORATION,
Appellee.

APPEAL FROM THE SUPREME COURT OF ILLINOIS.

STATEMENT IN OPPOSITION TO APPELLANTS' STATEMENT OF JURISDICTION AND MOTION TO DISMISS OR AFFIRM.

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The City of Chicago, a Municipal Corporation, appellee in the above-entitled cause, for its statement in opposition to appellants' statement as to jurisdiction herein, and in support of appellee's motion to dismiss or affirm, respectfully shows the following:

I.

Statement of Issues on Appeal.

The question sought to be presented in this Appeal is appellants' claim that an ordinance of the City of Chicago requiring the installation of safety devices on elevators is contrary to and in violation of the Fifth and Fourteenth

Amendments to the Constitution. Appellants contend that enforcement of the ordinance constitutes a deprivation of property without due process of law. The effect of installing the safety device required would be to prevent operation of the elevators unless the elevator doors were closed and it would be impossible to open the elevator door unless the car was at the floor level (Jurisdictional Statement, p. 16).

Appellee argued that the ordinance was clearly constitutional and the court below held that it was valid. The court below said (11 Ill. 2d 345; Jurisdictional Statement, p. 16):

> "Based upon advances in engineering, and no doubt upon experience gained during the thirty years appellees' elevators have been in operation, the city has determined that the greatest protection to human life is to be realized by door interlocks which will prevent the operation of elevators unless hatchway gates are closed, and permit the gates to open only when the elevator car is at gate level. In requiring all power elevators to be so equipped the city has done no more than to exercise its continuing power to make regulations needful to the common good and general welfare, subject to which all property is held."

The issue presented to this Court, therefore, is whether a municipality in the exercise of its police power and acting for the common good and general welfare in protecting human life and safety, may enact an ordinance requiring safety devices on elevators which have operated for some thirty years, during which time engineering advances have demonstrated that door interlocks preventing the operation of such elevators unless entrances thereto are closed and permitting the elevator gates to open only when the elevator car is at gate level, are necessary to prevent injury or death.

II.

No Substantial Federal Question Is Presented by the Attempted Appeal.

Appellants rely on the following cases to sustain the jurisdiction of this Court:

King Mfg. Co. v. *Augusta*, 277 U. S. 100, 72 L. ed. 801, 48 S. Ct. 489 (1928);

Jamieson v. *Texas*, 318 U. S. 413, 87 L. ed. 869, 62 S. Ct. 669 (1943);

Poulos v. *New Hampshire*, 345 U. S. 395, 97 L. ed. 1005, 73 S. Ct. 760 (1953).

None of these cases serve to sustain jurisdiction. Appellants have misconceived the issue. We are here concerned with the retrospective application of an ordinance to existing buildings. The cited cases are not concerned with this issue. They merely stand for the principle that a municipal ordinance is within the meaning of "statute" as set forth in 28 U. S. C. 1257 (2) We have never gainsaid this and it never was an issue in this proceeding.

The *King Mfg. Co.* case involved a suit to enjoin enforcement of an ordinance of the City of Augusta fixing rates for water power. The objection urged was that the ordinance was repugnant to the impairment of contract clause of the Constitution. The *Jamieson* case dealt with an ordinance which prohibited distribution of handbills. Members of Jehovah's Witnesses brought suit claiming that the ordinance violated constitutional inhibitions against infringement of free speech. The *Poulos* case was concerned with an ordinance which forbade religious meetings in public parks without a license. Members of Jehovah's Witnesses contended that the ordinance violated constitutional guarantees of free speech. None of the cases upon which appellants rely in their jurisdictional statement deal with an ordinance in any way similar

to the one involved in the case at bar. Such cases only stand for the proposition that a municipal ordinance is equivalent to a statute or a law which this Court will consider under its appellate jurisdiction. We have never denied this. However, the proposition of law that a municipal ordinance is inclusive in the term "statute" as stated in 28 U. S. C. 1257 (2) does not sustain appellants' contention that an ordinance having a direct relationship to the public safety and welfare is violative of the Fifth and Fourteenth Amendments of the Constitution of the United States.

Inasmuch as the cases upon which appellants rely in the jurisdictional statement are completely irrelevant to the issue here, this Court should reject their attempted appeal.

In asserting that the questions are substantial (Jurisdictional Statement, pp. 6-8), appellants resort to vague and indefinite generalities which in no manner indicate that there are substantial questions for this Court to consider. Not a single authority is cited to sustain appellants' position. In their Index, appellants have failed to list any cases or text references. They have omitted statutory enactments so that, as far as this Court is concerned, there is no law, statute or ordinance involved. Therefore, there is no constitutional question for this Court to resolve.

Appellants take the astounding position that the safety device required by the ordinance is unimportant to the public welfare. They infer that the City of Chicago enacted the ordinance to compel property owners to purchase safety devices which are of no merit. Appellants have the audacity to state (Jurisdictional Statement, p. 8):

> "The sole beneficiary will be the purely private interest of the promoters of the device."

Thus, appellants are in the position of accusing a legislative body of enacting an ordinance for the sole benefit of private interests. Nowhere in the record of this cause was such an outrageous thing suggested. It is now made to persuade this Court to accept this appeal without any basis in fact for such an unfounded accusation.

Appellants further say (Jurisdictional Statement, p. 8) that the State of Illinois, acting through the defendant municipality, has told them that they cannot use their property: "unless they first make peace with the developers and vendors of the contrivance prescribed by the ordinance." This Court will note that, in addition to citing no authorities, appellants cite no record references to sustain any of these statements. The fact remains that the court below found that the elevators now being operated by appellants are brought to a halt by a rope which hangs about three feet from the front of the shaft; that the doors to the elevator shaft can be opened manually even though the elevator is not at the floor; that it is possible to reach into the shaft (some three feet) and control the operation of the elevator from any level regardless of the location of the elevator; that it is the practice of appellants' employees to leave the brake unlocked, thus permitting exterior operation from any level; and that, as a result, the car may be removed from a level without the knowledge of the employee who took it there, the open doors leave the shaft unguarded, and employees leaning in to reach the controls must maneuver in time to avoid the moving car (11 Ill. 2d 339-340; Jurisdictional Statement, p. 10). In the light of these findings by the court below, appellants now say that the legislative body of the City of Chicago "has not intervened here in behalf of the general public welfare" (Jurisdictional Statement, p. 8).

In summarizing its opinion the court below said (11 Ill. 2d 346; Jurisdictional Statement, p. 17):

> "We conclude, *even without adverting to the need for correcting the dangerous practices which attend the operation of appellees' elevators,* that the retrospective application of the ordinance is both a reasonable and proper exercise of the police power." (Emphasis added.)

We respectfully ask this Court to examine appellants' Jurisdictional Statement in conjunction with the opinion of the court below. Appellants have raised no questions which would justify bringing this matter to this Court. We believe appellants are using dilatory tactics for purpose of delay, during which time the dangerous practices clearly disclosed in the opinion of the court below will continue to the detriment of the public health and safety.

Appellants state (Jurisdictional Statement, p. 6) that this case is "a matter of first impression in this Court" because

> "Never, however, has this Court addressed itself to the propriety of requiring substantial alterations in an improvement lawfully erected and not accessible to the general public, where the legislature has acted, not to ameliorate a demonstrated peril, but solely upon the basis of a technological advance which has been developed subsequent to the erection of the structure."

Contrary to appellants' statement, the elevators were "accessible to the general public." Thomas E. Martin, the elevator inspector for the city, testified that he observed customers using the elevators (Rec. 332-337). Philip Lamantia, one of the appellants, testified that occasionally he has observed someone using the elevators who is not connected with his firm (Rec. 528-529). Gus Economos, one of the appellants, testified that the garbage man uses the elevator (Rec. 591-592).

Furthermore, appelalnts do not deny that the "hustlers", who operate the elevators (Jurisdictional Statement, p. 4), could and do operate them in a manner which could cause injury to themselves and others (11 Ill. 2d 339-340; Jurisdictional Statement, p. 10).

Appellants argue that the hustlers and others using the elevators do not constitute members of the "public". The safety device required by the ordinance is for the benefit of all who use the elevators. There are no exceptions.

Appellants' statement that "the legislature has acted * * * solely upon the basis of a technological advance" and not for the public health and safety is negatived by the finding of the court below (11 Ill. 2d 342; Jurisdictional Statement, p. 13):

> "Nothing in the record supports the charge that the amendatory paragraph added in 1956 was for any purpose other than a legitimate exercise of the police power directed at protecting human life."

We submit that the installation of safety devices on elevators to prevent injury or death to the users thereof certainly bears a substantial relationship to the public health and safety. The users of the elevators, be they the hustlers, the employees, the owners or others, constitute a part of the "public" and are entitled to the protection afforded by the ordinances in question.

In stating what they conceive to be the questions presented by this attempted appeal, appellants charge that "no grounds are advanced for any belief that the operation has become more hazardous" (Jurisdictional Statement, p. 3). This ignores the statement of the court below that the operation of these elevators for some thirty years has led to a situation where improvement must be made (11 Ill. 2d 345-346; Jurisdictional Statement, p. 16). The time is gone when elevators can be operated by leaning into an elevator shaft and manipulating ropes and cords by hand to move and halt the elevators.

Appellants also refer to "substantial alterations in the structure" in their statement of questions presented by the attempted appeal (Jurisdictional Statement, p. 3). This is a deliberate effort to mislead this Court. No "substantial alterations" are required. Appellants have only to install safety devices on their existing elevators to comply with the ordinance. The effect of such devices will be to prevent operation of the elevators unless all doors leading into the shaft are closed. No door can be opened unless the car is at the floor level. Surely, this does not constitute "substantial alterations." True, if appellants elect to install automatic elevators, more work will be required. But no alterations need be made. It will only be necessary to convert the existing elevators into automatic elevators. The same shafts can be used and no alterations whatsoever will be required.

The only case to which appellants refer in their jurisdictional statement is *Queenside Hills Realty Co.* v. *Saxl*, 328 U. S. 80, 90 L. ed. 1096 (1946), from which the court below quoted in its opinion. Appellants state (Jurisdictional Statement, p. 5) that the Supreme Court of Illinois cited the *Queenside Hills Realty Co.* case as follows:

> "Little need be said on the due process question . . . in no case does the owner of property acquire immunity against the exercise of the police power because he constructed it in full compliance with the existing laws."

Appellants have quoted only the first sentence and last sentence of the quotation, omitting the numerous sentences intervening which give sense and meaning to the opinion of the court below. In discussing the *Queenside Hills Realty Co.* case, the court below said (11 Ill. 2d 344-345; Jurisdictional Statement, pp. 15-16):

> "Similar sentiments were expressed by our nation's highest court in *Queenside Hills Realty Co.* v. *Saxl*,

328 U. S. 80, 90 L. ed. 1096, where a New York law requiring the installation of sprinkler systems in existing lodging houses of nonfireproof construction was held constitutional. The court said: 'Little need be said on the due process question. We are not concerned with the wisdom of this legislation or the need for it. (Citation.) Protection of the safety of persons is one of the traditional uses of the police power of the States. Experts may differ as to the most appropriate way of dealing with fire hazards in lodging houses. Appellant, indeed, says that its building, far from being a fire-trap, is largely fireproof; and to the extent that any fire hazards exist, they are adequately safeguarded by a fire alarm system, constant watchman service, and other safety arrangements. But the legislature may choose not to take the chance that human life will be lost in lodging house fires and adopt the most conservative course which science and engineering offer. It is for the legislature to decide what regulations are needed to reduce fire hazards to the minimum. * * * But in no case does the owner of property acquire immunity against exercise of the police power because he constructed it in full compliance with the existing laws.' 328 U. S. at pp. 82-83, 90 L. ed. at p. 1098."

From the foregoing quote it is apparent that the opinion of the court below is in complete conformity with the views of this Court as expressed in the *Queenside Hills Realty Co.* case.

The court below held that ordinances similar to the one here involved were a valid exercise of the police power (109 A. L. R. 1117; 62 C. J. S., Mun. Corp. sec. 149; *Clarke* v. *City of Chicago*, 159 Ill. App. 20; *City of Chicago* v. *Washington Home of Chicago*, 289 Ill. 206; *O'Donnell* v. *Barach*, 1 Ill. App. 2d 157; *Doran* v. *Boston Store of Chicago*, 307 Ill. App. 456; *DeWolf* v. *Marshall Field & Co.*, 201 Ill. App. 542; *Adamec* v. *Post*, 273 N. Y. 250, 7 N. E. 2d 120; *City of Seattle* v. *Hinckley*, 40 Wash. 468, 82 P. 747).

Appellants do not discuss or attempt to distinguish any of the cases relied on by the court below in reaching its conclusion that the ordinance requiring the installation of safety devices on existing elevators is not unconstitutional. This, in our opinion, is appellants' admission that the opinion of the court below properly states the law, and that there are not substantial constitutional or federal questions involved which would justify the granting of this appeal.

Conclusion.

It is respectfully submitted that the provisions of the ordinance of the City of Chicago requiring the installation of safety devices on elevators is clearly a proper exercise of the police power. In the interests of human life and safety, the ordinance is applicable to existing buildings. The ordinance would be meaningless if applicable only to future construction as elevators of this antiquated type are no longer being installed anywhere in the country. Operation of elevators manually by manipulating cords and ropes is a dangerous and outmoded practice. Under its police power the municipality could well outlaw such elevators entirely and compel installation of modern equipment. They have not done so. They have merely required a safety device which will prevent movement of the elevators unless all doors to the shafts are closed and which will prohibit opening the door into the shaft unless the elevator is at the floor level. The cost of such installation is nominal.

We further submit that appellant should have proceeded by petition for certiorari, rather than by appeal, and we respectfully request that this Court consider the appeal as a petition for certiorari as the rules of court provide.

We further submit that that the questions presented in this appeal have long ago been so definitely determined that no substantial questions are presented by this appeal entitling appellants to invoke the jurisdiction of the Supreme Court of the United States.

We further submit that the cases which appellants have cited to sustain the jurisdiction of this Court are so remote from the issues here that they cannot possibly justify invoking the jurisdiction of this Court.

Wherefore, appellee respectfully moves that the within appeal be dismissed or that the judgment and decree of the Supreme Court of the State of Illinois be affirmed.

Respectfully submitted,

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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 482

BURGESS-NORTON MFG. CO.,
Appellant,

vs.

RICHARD J. LYONS, ET AL.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

JURISDICTIONAL STATEMENT.

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Dated: September ....., 1957.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. .....

BURGESS-NORTON MFG. CO.,

Appellant,

vs.

RICHARD J. LYONS, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

JURISDICTIONAL STATEMENT.

Burgess-Norton Mfg. Co. submits this jurisdictional statement pursuant to Rules 15 and paragraph 2 of Rule 13 of the Revised Rules of the Supreme Court of the United States.

OPINIONS BELOW.

The opinion of the Illinois Supreme Court, holding the Illinois Use Tax Act constitutional, is set forth in Appendix B hereto and reported in 11 Ill. 2d at page 294. The opinion stated that the questions raised nad been determined at the March, 1957 term of the Illinois Supreme Court in *Turner* v. *Wright*. The opinion referred to, in *Turner* v. *Wright*, set out in Appendix D hereto, is reported in 11 Ill. 2d at page 161 and 142 N. E. 2d at page 84. One judge filed

a dissenting opinion which is also set out in Appendix D and reported with the majority opinion. These opinions were promulgated after a rehearing had been granted in *Turner* v. *Wright*. The original opinion which held the act unconstitutional without dissent, on the ground that it violated the requirement of Article IX, Section 1[1] of the Illinois Constitution that all privilege taxes must be uniform as to the class upon which they operate, is set forth in Appendix C hereto, but is not reported.

JURISDICTION.

Plaintiff-appellant instituted suit in the Circuit Court of Sangamon County for a declaratory judgment pursuant to Ill. Rev. Stat., 1955, Ch. 110, § 57.1, and injunctive relief pursuant to Ill. Rev. Stat., 1955, Ch. 127, §§ 172 and 172a, and Ch. 37, § 72.26.

The judgment of the Illinois Supreme Court, the review of which is hereby sought, was dated May 23, 1957, and entered on that date. A copy of that judgment is apppended hereto as Appendix A. No petition for rehearing was filed.

A notice of appeal to this Court was filed with the clerk of the Illinois Supreme Court on August 20, 1957.

This Court has jurisdiction to entertain this appeal by reason of 28 U. S. C. § 1257(2).

The following cases sustain the jurisdiction of this Court to entertain this appeal: *McCollum* v. *Board of Education*, 333 U. S. 203, 206; *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 97; *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 407; *Southern Ry. Co.* v. *Clift*, 260 U. S. 316, 319; *Bowe* v. *Scott*, 233 U. S. 658, 662; *Schlemmer* v. *Buffalo, Rochester And Pittsburg Ry. Co.*, 205 U. S. 1, 11.

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1. Smith-Hurd Ill. Anno. Stat., Vol. "Constitution", p. 708.

STATUTE INVOLVED.

This appeal questions the constitutionality of the Illinois Use Tax Act. That act may be found in Laws of Illinois, 1955, pp. 2027-2037, and is set forth in full in Appendix E hereto. That part of the act which does not amend Section 4 of the Uniform Motor Vehicle Anti-Theft Act may also be found in Ill. Rev. Stat., 1955, Ch. 120, §§ 439.1-439.18. (The act was amended in 1957 without effecting changes material to the questions here involved. The act, as amended, is printed in C. C. H. Illinois State Tax Reporter, ¶ 94,810 *et seq.)*

QUESTIONS PRESENTED.

The following questions are presented by this appeal:

(1) Whether the Illinois Use Tax Act denies equal protection of the laws in violation of Section 1 of Amendment XIV to the Constitution of the United States by:

(a) taxing the use of property purchased from persons engaged in the occupation of making retail sales, but not taxing identical uses of identical or substantially identical property purchased from persons not engaged in the occupation of making retail sales:

(b) providing for a tax refund, when property purchased is returned by the purchaser to his seller, in the case of taxpayers who remit the tax to their sellers, but not in the case of taxpayers who remit the tax directly to the Illinois Department of Revenue instead of paying it to their sellers.

(2) Whether the Illinois Use Tax Act, in permitting a retailer to retain the use tax which he has collected from a purchaser, in connection with the sale of tangible personal property, to the extent that he is required to remit and does remit the tax imposed by the Illinois Retailers'

Occupation Tax Act with respect to the sale of the same property, provides for the gift of public funds for a private purpose and permits the taking of private property without due process of law in violation of Section 1 of Amendment XIV to the Constitution of the United States.

STATEMENT OF THE CASE.

(a) The Facts Disclosed by the Pleadings.

Plaintiff below, appellant here, filed a sworn intervening petition,[2] in the nature of a complaint, in the Circuit Court of Sangamon County, Illinois. That petition alleged, *inter alia*, the following:

Plaintiff is an Illinois corporation, maintaining its principal offices and place of business in the State of Illinois. It is engaged in the manufacturing business. Defendant Richard J. Lyons was Director of the Department of Revenue of the State of Illinois and Warren E. Wright State Treasurer.

During the month of September, 1955, plaintiff purchased tangible personal property from retailers for use and not for resale for the total sum of $22,013.19. Some of the retailers, from whom these purchases were made, had registered under the Illinois Retailers' Occupation Tax Act or had obtained a certificate of authority under the Use Tax Act; others had done neither.

Plaintiff filed a return with the Illinois Department of Revenue, and paid under protest the use tax upon all of its purchases for use from retailers during the month of September, 1955. This payment amounted to $550.37.

The petition also specified the particulars in which it was claimed that the Illinois Use Tax Act is unconstitutional.

A writ of injunction[3] was issued by the Circuit Court of

2. R. 3-34.
3. R. 38.

Sangamon County, Illinois, restraining defendant Wright from transferring out of the protest fund the $550.37 which plaintiff had paid into it. Thereafter, the defendants filed a motion[4] to dissolve the injunction and to dismiss plaintiff's "complaint", said motion asserting that the Illinois Use Tax Act is constitutional. No other defensive pleading was filed by defendants. By such motion the defendants admitted the foregoing allegations of fact contained in plaintiff's intervening petition.[5]

The motion of defendants was granted,[6] the Circuit Court having determined that the Illinois Use Tax Act was constitutional. Plaintiff then perfected an appeal directly to the Illinois Supreme Court.

(b) Synopsis of Statutory Provisions and Their Effect.

Before analyzing the provisions of the Illinois Use Tax Act it is necessary first to consider the Illinois Retailers' Occupation Tax Act.[7] That act, in effect since 1933, imposes a tax upon persons engaged in the business of selling tangible personal property at retail. The tax is exacted at the rate of 2½% of the gross receipts from retail sales made in the course of such business. That act does not obligate retailers to pass the tax on to their sellers.[8] The tax is on the retailer, and he is required to remit the tax to the Department of Revenue.

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4. R. 39-41.

5. *Krebs* v. *Thompson*, 387 Ill. 471, 476, 56 N. E. 2d 761, 764; *Swithiod Singing Club* v. *McKibbin*, 381 Ill. 194, 205, 44 N. E. 2d 904, 910; *Nichols Illinois Civil Practice*, Vol. 2, p. 394, § 1419.

6. R. 51-53.

7. Ill. Rev. Stat., 1955, Ch. 120, § 440 *et seq.*, (The act was amended in 1957 without effecting changes material to the questions here involved; see C. C. H. Ill. State Tax Rep., ¶ 94-633, *et seq.*, for the amended act).

8. *People's Drug Shop Inc.* v. *Moysey*, 384 Ill. 283, 51 N. E. 2d 144.

Section 1[9] of the act so defines the term "gross receipts" that amounts allowed as credit for property taken in trade are excluded from gross receipts, and no tax is thus imposed upon the value of such trade-ins. Section 2a[10] of the act requires all persons engaged in the business of selling tangible personal property at retail in Illinois to obtain a Certificate of Registration from the Department of Revenue.

The tax is an occupation tax, not a sales tax. Only persons who are actually engaged in the business of selling tangible personal property at retail are taxed by the act. Thus, by Section 1[11] of the act, the isolated or occasional sale of tangible personal property by one who does not habitually engage in the business of making retail sales is not taxable. By court decision, numerous persons who make retail sales but who are deemed to be engaged primarily in the business of performing a service rather than the business of retail selling have been held not subject to the tax. These persons include clubs selling food and drink to its members;[12] optometrists and opticians selling eyeglasses;[13] manufacturers selling made-to-order machine tools.[14]

By rules promulgated by the Illinois Department of Revenue under the authority of Section 12[15] of the Retailers' Occupation Tax Act, similar distinctions are made. Thus, by way of example, by Rule 3,[16] the sale of machines, tools,

9. *Supra*, n. 7, §440.
10. ibid., § 441a.
11. ibid., § 440.
12. *Svithiod Singing Club* v. *McKibbin*; 381 Ill. 194, 44 N. E. 2d 904.
13. *Babcock* v. *Nudelman*, 367 Ill. 626, 12 N. E. 2d 635.
14. *Ingersoll Co.* v. *Dept. of Revenue*, 405 Ill. 367, 90 N. E. 2d 747.
15. *Supra*, n. 7, § 451.
16. C. C. H. Ill. State Tax Rep., ¶ 60-106.

dies, jigs, patterns and gauges produced to the special order of the purchaser is not taxable; the sale of those not produced to special order is taxable. By rule 12,[17] persons selling letterheads, envelopes, and labels are not taxable if the name of the purchaser is placed on such items, but are taxable if such items are not so personalized. By Rule 23,[18] sellers of tailor-made clothing are not taxable, but sellers of ready-to-wear clothes are taxable, even though such clothes are altered upon special order to the requirements of the purchaser. By Rule 25,[19] sellers of monuments who have placed an inscription thereon are not taxed, but sellers who have not placed an inscription thereon are not taxed, but sellers who have not placed an inscription on the monuments which they sell are taxed.

The Illinois Use Tax Act became effective in 1955. That act, by Section 3, imposes a tax at 2½% of the selling price upon the privilege of using tangible personal property purchased at retail from a retailer. It applies to the use of all property purchased from retailers for use in Illinois whether the retailer is obligated to pay the Retailers' Occupation Tax because he is doing business in Illinois or is not so obligated, by virtue of the commerce clause of the United States Constitution, Article I, Section 8, because he is not doing business in Illinois. The act is thus distinguishable from the Washington use tax act upheld under the commerce clause in *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, which act effectively imposed a tax only on the use of property purchased in interstate commerce.

The term "selling price" is not defined,[20] however, so as to exclude property given in trade, unlike the Retailers' Occupation Tax Act. Hence, on sales transactions wherein

17. ibid., ¶ 60-120.
18. ibid., ¶ 60-126.
19. ibid., ¶ 60-128.
20. The definition is contained in Section 2 of the act.

property is given in trade, the use tax will exceed the Retailers' Occupation Tax.

Retailers are required, by Section 3 of the act, to collect the tax from users if they have a Certificate of Registration under the Retailers' Occupation Tax Act, or if they do not maintain a place of business in Illinois, but have been authorized under Section 6 of the Use Tax Act to collect the tax. Users, who purchase property from retailers not maintaining a place of business in Illinois and not authorized to collect the tax, are required by Section 10 of the act to remit the tax directly to the Department of Revenue. Section 9 requires retailers to remit the tax collected to the Department of Revenue, except that a retailer is not compelled to remit "that part of any tax collected by him to the extent that he is required to remit and does remit the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property". Thus, while as to each retail sales transaction in which the Retailers' Occupation Tax is imposed, the Use Tax is also imposed, only the Retailers' Occupation Tax reaches the state treasury, the use tax being retained by the retailer. This, plaintiff contends, results in the imposition of the use tax for a private purpose in violation of the due process clause of the Fourteenth Amendment.

Even though the use tax is exacted for the use of property, not for engaging in the occupation of selling it, the use tax is not imposed, by the dictate of Section 3, if the seller would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois. Hence, to determine liability for use tax, one must first determine whether the seller is engaged in the business of selling tangible personal property at retail. If he is not, no use tax is due on the transaction. The use of property purchased from one making an isolated or occasional sale and not habitually engaged in making retail sales is not taxed. Nor, following the rules, noted

above, promulgated under the Retailers' Occupation Tax Act, is the use of machines manufactured to the special order of the purchaser, personalized letterheads, tailor-made clothes, or monuments containing an inscription taxable, by way of examples.

The effect of these exclusions is to deny equal protection of the law. While the classification is reasonable for the occupation tax, it is unreasonable and arbitrary for the use tax. In countless instances two persons will purchase identical or substantially identical property, as, for example a tailor-made suit by one and a ready-made suit by the other, neither article capable of any different use than the other. Despite the fact that the use of the property is the incident of the tax, one will be taxed and the other will not.

Section 9 of the act entitles a user, returning property to a retailer from whom the property was purchased and to whom the user has remitted the use tax, to a refund of the tax. But no provision is made under Section 10 for a refund to a user who returns the property he purchased to the seller but who paid the tax in the first instance directly to the Department of Revenue. This is a patent denial of equal protection.

(c) Time, Manner and Method by Which Questions Sought to Be Reviewed Were Raised and Considered.

On February 1, 1957, Justice Schaefer of the Illinois Supreme Court entered an order[21] that the brief and the answer to the petition for rehearing filed by Burgess-Norton Mfg. Co. and the law firm of McDermott, Will & Emery as *amici curiae* in *Turner* v. *Wright*, 11 Ill. 2d 161, 142 N. E. 2d 84, should stand as the briefs of the plaintiff in this cause, that defendants' brief, petition for rehearing, and reply to the answers to the petition for rehearing filed

21. R. 70-71.

in that case should stand as defendants' brief in this case, and waiving the filing of an abstract of record. On June 12, 1957, the Illinois Supreme Court, by order,[22] granted the motion[23] of plaintiff that the briefs and answer to the petition for rehearing filed by the plaintiff in *Turner* v. *Wright, supra,* should stand additionally as the briefs of the plaintiff in this case, and that the opinion of the Illinois Supreme Court in this case should be deemed to have included a consideration of the issues raised by those briefs and answer to the petition for rehearing. No further briefs were filed with the Illinois Supreme Court in this case.

The issues involving the equal protection clause were raised in paragraphs 9, 10, and 11 of the intervening petition filed by plaintiff in the Circuit Court of Sangamon County.[24] The due process issue was not raised, as such, in that court.[25]

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22. R. 99.

23. R. 96-98.

24. Paragraph 9 of the petition (R. . .) cited instances wherein users were not taxed because their sellers were not deemed "retailers". Paragraph 10 (R. . .) urged that no provision for refunds was made for users returning property to retailers to whom the use tax had not been remitted. Paragraph 11 stated:

> "11. Section 1 of Amendment XIV of the Constitution of the United States provides, among other things, that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' The said Use Tax Act is repugnant to the said constitutional prohibition for the reason that it seeks to impose the said Use Tax upon certain users of tangible personal property while exempting therefrom other users of substantially similar or identical tangible personal property, predicating the selection of the persons who shall and those who shall not pay the tax upon distinctions and considerations which are arbitrary and unreasonable and have no relation whatsoever to the use of the said tangible personal property which is taxed. Some of the particulars with reference to the said discriminations are set forth in paragraphs 9 and 10 hereof, which are incorporated by reference in this paragraph.

25. Plaintiff asserted that the fact that the use tax was retained by retailers in the majority of cases violated the requirement of

The argument that the act, in taxing the use of property purchased from "retailers" but not the use of identical property purchased from sellers not deemed to be "retailers", violated the equal protection clause was raised at pages 30 to 34 of the brief filed by the appellant in *Turner* v. *Wright*, *supra*,[26] and pages 31 to 36 of the brief filed by *amici curiae* in that case.[27] This contention was not considered, as such, by the Illinois Supreme Court in its final opinion in the *Turner* case.[28] The Court directed itself, in this regard, to the question whether the act satisfied the requirement of Article IX, Section 1 of the Illinois Constitution[29] that all privilege taxes be uniform as to the class upon which they operate. The

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Article IX, Section 7 of the Illinois Constitution (Smith-Hurd Ill. Anno. Stat., Vol. "Constitution", p. 757) that all taxes be paid into the state treasury.

26. R. 100:

"As previously pointed out, buyers from persons engaged in service occupations (with the sole exception noted in Division III hereof) are not required to pay the use tax. The result is that a preferred class of buyers has been exempted from the tax. • • • We submit that the Use Tax Act, for the reasons given, is discriminatory and not uniform as to class; and, under the decisions cited, it violates the uniformity clause of Sec. 1 Art. IX, Sec. 2 Art. II and Sec. 22 Art. IV of the Illinois constitution and the Fourteenth Amendment to the United States Constitution."

27. R. 102:

"In plaintiff's brief it is noted that the Use Tax Act unreasonably and unconstitutionally taxes those purchasing from persons not engaged in service occupations while exempting from tax those purchasing from persons engaged in service occupations. The flagrancy of such a discrimination deserves emphasis in addition to such emphasis as is made in plaintiff's brief.

• • • • •

"Accordingly, the Use Tax Act unreasonably classifies those subject to the tax in violation of Section 1 of Article IX of the Illinois Constitution, and denies to certain purchasers subject to tax the equal protection of the laws in violation of Section 1 of Amendment XIV to the United States Constitution."

28. App. D, *infra*.

29. *Supra*, n. 1.

opinion of the Illinois Supreme Court in this case[30] was stated to be based on its decision in the *Turner* case.

The argument that the act violates the equal protection clause in failing to provide for refunds to users returning purchased property but paying the tax directly to the Department of Revenue while making such a provision for users returning merchandise to retailers to whom they remitted the use tax in the first instance was raised at pages 29 to 30 of the appellant's brief filed in *Turner* v. *Wright, supra.*[31] This argument was not discussed by the Illinois Supreme Court in its opinion in the *Turner* case.

The due process argument was raised at pages 3, and 17 to 19 of appellant's brief in *Turner* v. *Wright, supra.*[32] The argument was considered by the Illinois Supreme Court in its opinion in the *Turner* case, in terms of the Illinois Constitution, not the United States Constitution.[33]

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30. App. B, *infra.*

31. R. 100:

"Sec. 9 provides that in case a retailer collects the tax and the purchaser thereafter returns the property purchased, the retailer shall refund the purchaser on account of the tax paid. No provision for refund is made in favor of a taxpayer who does not buy personal property from a retailer with a license but pays the tax directly to the Department of Revenue.

"Here we have a discrimination between two classes of taxpayers without reasonable basis. This is a violation of the equal protection clauses of the state and federal constitutions, and the uniformity clause of Sec. 1, Art. IX of the Illinois constitution."

32. R. 100: It is stated on page 3 of that brief:

"Sec. 9 of the act allows a retailer collecting the use tax for the state to retain it as his own and the tax never reaches the state treasury. As a consequence non-taxpayers are the sole beneficiaries of the taxes paid by taxpayers. It is a violation of the due process of law provisions of the state and federal constitutions to take a citizen's money from him under the guise of taxes and then refund it to one who was not the taxpayer."

33. App. D, *infra*, pp. 44-45.

No assignment of errors was filed in the Illinois Supreme Court because Rule 36 of the Illinois Supreme Court Rules[34] does not require that such an assignment be included in the record on appeal.

THE QUESTIONS ARE SUBSTANTIAL.

(a) The Jurisdictional Authorities Sustain This Court's Jurisdiction.

As demonstrated, the questions presented on this appeal were fully presented to the court below. Nonetheless, that court sustained the validity of the Illinois Use Tax Act. Since the validity of a state statute was thus drawn in issue in terms of the United States Constitution, and since its validity was upheld, this Court has jurisdiction to entertain this appeal, *McCollum v. Board of Education*, 333 U. S. 203, 206; *Stewart & Co.* v. *Sadraqula*, 309 U. S. 94, 97.

The mere fact that the Illinois Supreme Court did not discuss any of the issues raised expressly in terms of the United States Constitution does not preclude this Court from jurisdiction. It is enough that the Federal issues were fully presented, as they were, and implicitly passed upon, as they were because the Court upheld the Use Tax Act in the face of the objections, *Bowe* v. *Scott*, 233 U. S. 658, 662; *Schlemmer* v. *Buffalo, Rochester and Pittsburgh Ry. Co.*, 205 U. S. 1, 11. That the due process issue was not raised as such in the trial court is immaterial to the jurisdiction of this Court since the Illinois Supreme Court considered the issue before it on appeal,[35] *Home Ins. Co.* v. *Dick*, 281 U. S. 397, 407.

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34. Ill. Rev. Stat., 1955, Ch. 110, § 101.36(2)(a).

35. As noted, *supra*, p. 10, the Court entered an order on June 12, 1957 granting plaintiff's motion that its opinion herein of May 23, 1957 be deemed to have included all of the issues raised by the brief of the appellant in *Turner* v. *Wright*, 11 Ill. 2d 161, 142 N. E. 2d 84. The due process issue was raised in that brief, see p. 12, *supra*.

Nor does the jurisdiction of this Court fail because plaintiff did not petition the Illinois Supreme Court for a rehearing, *Southern Ry. Co.* v. *Clift*, 260 U. S. 316, 319, as it was entitled to do within fifteen days after the filing of the court's opinion.[36]

Moreover, plaintiff is directly affected by all of the issues raised. It is and has been subjected to tax by an act which must either be accepted in its entirety or rejected in its entirety. As to the exclusion of users who purchase from those not engaged in the business of retailing, the Illinois Supreme Court so held in its first opinion.[37] The Court's reasoning would apply equally to the other constitutional objections, for the Court stated:

> "We consider the provisions of this act so mutually connected and dependent, as conditions, considerations, and compensations for each other, that the legislature intended them as a whole, and the entire act must fall."

This Court should accept the construction of the state court, *Madden* v. *Kentucky*, 309 U. S. 83, 86-87. Its construction is supported by the decisions of both this Court and the Illinois Supreme Court.[38]

(b) The Equal Protection Issues Are Substantial.

The Illinois use tax is imposed on the privilege of using tangible personal property. It is not exacted for the privilege of purchasing property, nor for the privilege of selling it. The taxable event is simply the use of tangible personal property.

But whether liability for the use tax attaches to the use of property is made to depend upon the nature of

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36. Ill. Rev. Stat., 1955, Ch. 110, §101.44(1).

37. App. C, *infra*, pp. 37-38.

38. *Allen* v. *Louisiana*, 103 U. S. 80; *Winter* v. *Barrett*, 352 Ill. 441, 186 N. E. 113.

the seller. If the seller is engaged in the occupation of selling at retail, the purchaser must pay the tax. If the seller is deemed to be engaged primarily in performing a service, or if he does not habitually engage in the business of retail selling, but makes isolated or occasional sales of personal property, the purchaser need not pay the tax for the use of the property which he buys.

As a result of this distinction which is not inherent in the use of property which is the incident of the tax, in numerous instances, the uses to which taxpayers and those not taxed can put the property which they purchase are identical, and the property acquired by them is identical or substantially so. Yet it is the use which is taxed. Thus the act makes an arbitrary and unreasonable classification which plaintiff asserts denies it the equal protection of the laws, *Smith* v. *Cahoon*, 283 U. S. 553.

The occasions of discrimination are many, but a single example will serve to illustrate. One man buys a tailor-made suit. A second man purchases a ready-made suit, and pays for substantial alterations. As the court below stated, "so far as the use by the purchaser is concerned there is no distinction between a tailor-made suit of clothes, for example, and one purchased at retail." Yet, the second man must pay the use tax; the first need not.

Defendants contend, and the court below held, that the classification is reasonable because it is related to the purpose of rendering the Use Tax Act complementary to the Retailers' Occupation Tax Act. The Illinois Supreme Court stated:

> "But the tax before us does not stand alone. It is designed to complement and to protect the tax imposed upon the occupation of selling at retail, and the validity of its exemptions is to be determined in the light of that purpose."

The purported justification of the unreasonable classification is without merit.

The court below would sanction the classification merely because it is relatable to a legislative purpose, even though it is not based on differences between the taxed and the tax free. True enough, this Court has many times stated that legislative distinctions will not be invalidated if reasonably related to the object of the legislation, *Asbury Hospital* v. *Cass County*, 326 U. S. 207, 214; *Welch* v. *Henry*, 305 U. S. 134, 144; *Rapid Transit Corp.* v. *New York*, 303 U. S. 573, 578. Yet, this Court has also required in every equal protection case, "that the classification rest upon a substantial difference so that all persons similarly circumstanced will be treated alike," *Hart Refineries* v. *Harmon*, 278 U. S. 499, 502.

Thus, while the equal protection clause condones a classification based on differences if the differences are reasonably related to the legislative purpose, it does not waive the requirement that there be differences merely because the classification has some relationship to a legislative purpose. The cases which have approved legislative distinctions related to the object of legislation have in each case pointed out the differences between those taxed and those not taxed. In the *Rapid Transit Corp.* case, *supra*, for instance, the Court stated:[39]

> "Since carriers or other utilities with the right of eminent domain, the use of public property, special franchises or public contracts, have many points of distinction from other businesses, including relativ freedom from competition, especially significant with increasing density of population and municipal expansion, these public service organizations have no valid ground by virtue of the equal protection clause to object to separate treatment related to such distinctions."

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39. 303 U. S. 579.

Since the classification of the Use Tax Act does not rest upon any difference between the taxed and the tax free, as the court below concedes, the classification cannot escape the condemnation of the equal protection clause despite its relationship to the purpose of the legislation.

Moreover, the court below ignores the fact that whatever the relationship of the classification to the legislative purpose, it was not compelled by that purpose. The Retailers' Occupation Tax Act applies only to those engaged in the business in Illinois of retail selling. Prior to the adoption of that act, Illinois purchasers could buy property for use in Illinois out of the state tax free. Illinois purchasers could thereby deplete the business of Illinois merchants and reduce collections under the Retailers' Occupation Tax Act to the extent that purchases were made out of the state merely to avoid the tax. Presumably, the Use Tax Act was designed to prevent these depletions. Yet, if all those who purchased from persons engaged in service occupations were also subjected to the use tax, this purpose would still be achieved. In terms of this fact, the effect of the opinion of the court below is to condone the removal of one evil by the legislature at the expense of the creation of a second, even though the first can be readily eliminated without producing the second.

Furthermore, the court below is incorrect in holding that the Use Tax Act complements the Retailers' Occupation Tax Act in a sense that is of substantive significance. The asserted complement is that while the use tax is on the purchaser and the retailers' occupation tax on the seller, the result of the two acts when taken together is that one tax reaches the state treasury with respect to each retail sale by a retailer, whether the sale is made in interstate or intrastate commerce. Such a complement is not of the sort that can free the classification of the Use Tax Act from the stigma of its equal protection clause violation.

Other cases are to be distinguished. In *Henneford v. Silas Mason Co.*, 300 U. S. 577, the Washington use tax was deemed not to discriminate against interstate commerce, even though effectively imposed only on the use of property purchased in interstate commerce, since intrastate purchasers were taxed under the sales tax. This court held the two acts to be "complementary", that they should be considered together, and that, so considering them, no discrimination resulted. A similar result, as to both interstate commerce and equal protection objections, was reached for similar reasons in *Gregg Dyeing Co. v. Query*, 286 U. S. 472.

Here, unlike those cases, even though the Retailers' Occupation Tax Act and the Use Tax Act be considered together, discrimination, in the failure of the Use Tax Act to tax users who purchase from those engaged in performing services as well as those who purchase from retailers, remains, and the alleged complement cannot excuse the denial of equal protection. Comparably, in *Wheeling Steel Corp. v. Glander*, 337 U. S. 562, an Ohio *ad valorem* tax was struck down under the equal protection clause when the reciprocity features of the taxing act did not achieve the equality claimed for them.

Moreover, the Use Tax Act does not, in fact, complement the Retailers' Occupation Tax Act in any sense. Instead it effectively repeals the act which it supposedly complements. The use tax is imposed on all users of property purchased at retail, whether the property is purchased in interstate or intrastate commerce. The act, therefore, taxes the user for the use of the same property for the sale of which the retailers are taxed under the Retailers' Occupation Tax Act. Whenever the Retailers' Occupation Tax Act applies, the Use Tax Act also applies. Double taxation on intrastate retail sales transactions is avoided simply by letting retailers retain the use tax which they collect if they are remitting the retailers' tax with respect to the same transaction.

That the retailers continue to pay the retailers' tax is no more than a fiction, maintained only by permitting the retailers to put the use tax which they collect into one pocket and by requiring them to take the retailers' tax out of the other. Though nominally the retailers' occupation tax is paid into the state treasury, in substance it is not. In substance it is the use tax which is paid into the state treasury as to both intrastate and interstate transactions. The Retailers' Occupation Tax Act is, therefore, effectively repealed. Moreover, if the Retailers' Occupation Tax Act were actually as well as practically repealed, the alleged consequence of taking the two acts together, that one tax reaches the state treasury with respect to one retail sales transaction, would still be achieved. As a result, the Use Tax Act must stand alone, contrary to the opinion of the court, and its classification must be justified on that basis.

But the classification cannot be so justified. This the court below apparently concedes.[40] While the court's opinion is couched in terms of the uniformity requirement of the Illinois Constitution,[41] what applies with respect to that requirement should apply in equal degree to the equal protection clause.

The absence of a true complement is also evident from the fact that the Use Tax Act broadens the base of the Retailers' Occupation Tax Act. The former imposes a tax on the value of property given in trade. The latter does not. If the selling price of an automobile is $3,000, and a purchaser is given a $1,000 credit for a used car given in trade, so that the cash price is $2,000, the use tax is $75 and the retailers' tax only $50.

The fact that the Use Tax Act broadens the base of the

40. Justice Davis stated dissenting, App. D, *infra*, p. 51, "• • • the majority implicitly concede that the Use Tax Act, if it stood alone, would be unconstitutional for lack of uniformity • • •"

41. *Supra*, n. 1.

Retailers' Occupation Tax Act further points up the incongruity of the reasoning of the Illinois Supreme Court. The court below would authorize the legislature to discriminate in the interest of protecting but not broadening the base of the Retailers' Occupation Tax Act, but at the same time would permit the legislature to broaden that base by the act effecting the discrimination.

Once the principle that legislative classifications must be reasonable, not arbitrary, is ignored by reasoning as spurious as that employed by the court below, absurdities are difficult to avoid. This is evident from the opinion of the court below. In answer to the proposition that the use tax could not be sustained as a privilege tax under the Illinois Constitution, the Illinois Supreme Court said, "Such a protective tax can depend for its justification upon the tax that it supports."[42] Then, referring to a provision relating to building contractors, and reducing its reasoning to its ultimate absurdity, the Court stated:[43]

> "In any case, so far as the use tax is concerned, this particular provision stands upon no different footing than the others that are designed to correlate the two statutes. If there is vice in the provision as it appears in the Retailers' Occupation Tax Act, the attack should be directed at that act, and not at the statute designed to complement it."

The dissenting opinion summarized the doctrine of the majority this way:[44]

> "The effect of the majority decision seems to be that once a tax is enacted for the general purpose of protecting a prior tax the subsequent tax (1) need not meet constitutional limitations, (2) cannot be constitutionally attacked if it complements similar provisions of the prior act; and (3) can go further than protection and can create an entirely new tax."

42. App. D, *infra*, p. 43.
43. App. D, *infra*, p. 48.
44. App. D, *infra*, p. 55.

This doctrine of the court below serves only to emphasize the extremes to which the court has forced itself in its attempt to justify the arbitrary and unreasonable classification of the Use Tax Act.

The court did not comment on the patent denial of equal protection resulting from the provision for refunds to purchasers returning property to retailers to whom they had remitted the use tax but not to purchasers returning property but paying the tax directly to the Department of Revenue. Defendants contended below that such a provision for the latter group was made by Section 10 of the act. This court, exercising its power of construction in the absence of an interpretation by the Illinois Supreme Court, *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55, 75, should have little difficulty in finding that no such provision is made.

The explanation for the discrimination is apparently that the legislature sought to make the Use Tax Act "complementary" to the Retailers' Occupation Tax Act, by providing for refunds to correspond to those authorized by the latter act,[45] but sought to go no further. This explanation further emphasizes the absurdity of attempting to justify a discrimination in the name of a "complement," when, even though the two acts are taken together, the discrimination remains.

(c) The Due Process Issue Is Substantial.

As stated above, while the Use Tax Act in form authorizes retailers to retain the use tax which they collect to the extent they are remitting retailers' occupation tax on the same transaction, in practical effect the use tax reaches the state treasury, and the retailers' tax does not. The retailers are, therefore, relieved of the obligation to remit

45. Section 6, Ill. Rev. Stat., 1955, Ch. 120, § 445.

the retailers' occupation tax, and the Retailers' Occupation Tax Act is effectively repealed. If this reasoning is accepted, then the classification of the Use Tax Act cannot be justified on the ground that that act complements the Retailers' Occupation Tax Act. It is fatuous to suggest that one act complements another, when the supposedly complemented act has been effectively repealed.

On the other hand, if this reasoning is not accepted, then a violation of the due process clause results. For, if the use tax is deemed in substance retained by the retailers, and not paid into the state treasury, use taxpayers must give up their property for the private purpose of having it bestowed upon the retailers.

Moreover, the retention of the use tax by retailers in such case would not be occasional. It would occur potentially in the case of every Illinois retail sale by a retailer in intrastate commerce. Millions of dollars in taxes would thus be retained by retailers.

The rule is, of course, too well settled to deny that the imposition of a tax by a state for a merely private purpose violates due process requirements, *Green* v. *Frazier*, 253 U. S. 233, 238. The question is rather, in each instance, whether the impost is exacted for a public or a private purpose.

There is certainly no public benefit in bestowing public funds upon retailers *qua* retailers. Such a gift is as devoid of public purpose as the loans to private manufacturers held violative of due process in *Loan Association* v. *Topeka*, 87 U. S. (20 Wall) 655 and *Parkersburg* v. *Brown*, 106 U. S. 487, and the limitation on the oil production of one group to force that group to purchase part of its oil requirements from a second group struck down in *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55.

The court below stated that the provision authorizing the retention of the use tax by retailers can be considered a gift of public funds for a private purpose "only if the way in which the two taxes are interrelated is ignored".[46] If the court meant by this that the use tax is in each case in practical effect paid into the state treasury, then as indicated above, the proposition that the classification of the Use Tax Act can be justified on the basis of its "complementing" the Retailers' Occupation Tax Act must fall.

On the other hand, if the court below deemed the use tax to be in effect retained by the retailers and meant by its statement only that the legislative purpose, in authorizing retailers to retain the use tax, was to prevent more than one tax being paid into the state treasury with respect to each retail sales transaction, then the court's proposition is no answer to the argument that the Use Tax Act is repugnant to the due process clause. Such a rationale serves only to emphasize the lack of public benefit in the retention of the use tax by retailers. For it says in effect that the legislative scheme was to be effected by a non-state use of the public funds collected by the retailers. Thus, the legislative purpose was that the use tax would be directed to private benefit. Such a purpose is patently a private one, and the mere incidental fulfillment of a pattern of legislation does not make it otherwise.

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46. App. D, *infra*, p. 45.

CONCLUSION.

The questions presented are of substantial importance, and this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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Attorneys for Appellant.

September, 1957.

APPENDIX A.

Judgment of the Illinois Supreme Court.

The following is a copy of the judgment of the Illinois Supreme Court appealed from:

UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss.
SUPREME COURT. }

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of May, in the year of our Lord, one thousand nine hundred and fifty-seven, within and for the State of Illinois.

Present:

Ray I. Klingbiel, Chief Justice; Justice Joseph E. Daily; Justice Walter V. Schaefer; Justice George W. Bristow; Justice Harry B. Hershey; Justice Charles H. Davis; Justice Byron O. House; Latham Castle, Attorney General; Robert G. Miley, Marshal.

Attest:

Mrs. Earle Benjamin Searcy, Clerk.

Be It Remembered, that, to-wit: on the 23rd day of May, 1957, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

Burgess-Norton Mfg. Co., an Illinois Corporation, *Appellant*, vs. Richard J. Lyons, Director of the Department of Revenue of the State of Illinois, and Warren E. Wright, State Treasurer of the State of Illinois, *Appellees*.	Appeal from Circuit Court Sangamon County. 1046A-55 Error to.

No. 34137

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Circuit Court of Sangamon County aforesaid, BE AFFIRMED IN ALL THINGS AND STAND IN FULL FORCE AND EFFECT, notwithstanding the said matter and things therein assigned for error.

APPENDIX B.

Opinion of the Illinois Supreme Court in This Cause.

Docket No. 34137—Agenda 9—March, 1957.

BURGESS-NORTON MANUFACTURING COMPANY, *Appellant*, v. RICHARD J. LYONS, Director of Revenue, *et al.*, *Appellees*.

Per Curiam: Complaint for a declaratory judgment that the Use Tax Act (Ill. Rev. Stat. 1955, chap. 120, par. 439.1-439.18 incl.) is unconstitutional and for temporary injunction was filed in the circuit court of Sangamon County. Upon motion the trial court dismissed the complaint for want of equity, but continued the temporary injunction in effect until the final determination of the cause.

The questions raised in this proceeding were determined at the March term of this court, in *Turner* v. *Wright*, Docket No. 34044, wherein we held the Use Tax Act to be constitutional, and wherein the present plaintiff filed brief and argument as *amici curiae*. Therefore, the judgment of the trial court is affirmed.

Judgment affirmed.

MR. JUSTICE DAVIS, dissenting. (See dissent in *Turner* v. *Wright*, No. 34044.)

APPENDIX C.

First Opinion of the Illinois Supreme Court in Turner v. Wright.

Docket No. 34044—Agenda 42—May, 1956.

JOHN W. TURNER, JR., *Appellant*, v. WARREN E. WRIGHT, State Treasurer, *et al.*, *Appellees*.

MR. JUSTICE DAVIS delivered the opinion of the court:

This case comes to us on direct appeal from the order of the circuit court of Cook County dismissing plaintiff's complaint for a declaratory judgment and injunction against the enforcement of the Illinois Use Tax Act (Ill. Rev. Stat. 1955, chap. 120, pars. 439.1-439.18), and the 1955 amendment to section 4 of the Uniform Motor Vehicle Anti-Theft Act (Ill. Rev. Stat. 1955, chap. 95½, par. 77) which made certain incidental but necessary changes as an enforcement aid to the Use Tax Act, on the ground that such enactments are unconstitutional.

The plaintiff, a citizen and taxpayer of Illinois, purchased a motor vehicle in Indiana on August 1, 1955, from a retail automobile dealer, and thereafter took possession of, and brought said vehicle into Illinois, where he used and operated it. By the terms of the Use Tax Act, he was required to pay a use tax to the Department of Revenue, which he did under protest. The case squarely questions whether the Illinois Use Tax Act contravenes the revenue provisions of the constitution of the State of Illinois, as well as other constitutional guarantees.

It is the contention of the plaintiff that the Use Tax Act violates the Illinois constitution and the fourteenth amendment to the United States constitution. *Amici curiae* urge

that the use tax is not in fact a privilege tax, but rather that it is a property tax without uniformity and that the act unreasonably classifies persons, all in violation of section 1 of article IX and the fourteenth amendment.

The defendants, by the Attorney General, argue that the Illinois use tax is a nondiscriminatory tax, and that the act is not vague but is justified as being complementary to and a corollary of the Retailers' Occupation Tax Act (Ill. Rev. Stat. 1955, chap. 120, pars. 440-453). Defendants further contend that any discriminatory provision contained in the act is severable.

Before analyzing the specific constitutional objections raised, we believe it proper to examine generally the provisions of the Illinois Use Tax Act. The act imposes a tax upon the purchasers of all tangible personal property purchased at retail and not for the purpose of resale. The tax is at the rate of 2½ per cent of the selling price, and is imposed upon all purchasers whether they buy within or outside the State. If the taxpayer buys from a retailer licensed under the Retailers' Occupation Tax Act, the retailer is required to collect the tax and give the buyer a receipt. A nonresident retailer is entitled to obtain a permit from the Department of Revenue and collect and remit the tax. If a taxpayer purchases property from a retailer who is not required to file returns with the Department and does not pay the tax to the retailer, the taxpayer shall file a return and pay the tax directly to the Department of Revenue. However, if a particular seller, such as one engaged in a service occupation, would not be taxable under the Retailers' Occupation Tax Act if the sale had occurred in Illinois, then the tax imposed by the Use Tax Act does not apply. This is true except in the case of any person who is engaged in a business which is not subject to the tax imposed by the Retailers' Occupation Tax Act because of involving the sale of, or a contract to sell real estate, or

construction contract to improve real estate, but who, in the course of conducting such business, transfers tangible personal property to users or consumers in the finished form in which it was purchased; and which does not become real estate. In such a transaction, if a separate charge is made for tangible personal property so transferred, the value of such property shall be the amount separately charged, or if no separate charge is made, the value of such property shall be its cost to the transferor, and such use of tangible personal property is subject to the use tax although it would not be subject to the retailers' occupation tax.

While under the act, if a single sale of tangible personal property takes place in Illinois, the use tax and retailers' Occupational tax are both due, the Use Tax Act provides that a retailer need not remit that part of any tax collected by him to the extent that he remits the tax imposed by the Retailers' Occupation Tax Act. The act further provides that when the taxpayer pays the tax directly to a retailer, the latter may refund the money if the property is later returned to the retailer; however, no such refund provision is given a taxpayer who, by the act, is required to pay the tax directly to the Department of Revenue.

We think it helpful to a decision of the question before us to consider the history and development of the revenue article of our constitution, as well as the Use Tax Act, which was enacted in an effort to obtain revenue within the proscriptions of State and Federal constitutions. Originally, general property taxes were the principal source of revenue in Illinois, and our first constitution provided "that the mode of levying a tax shall be by valuation, so that every person shall pay a tax in proportion to the value of the property he or she has in his or her possession." (Const. of 1818, art. VIII, sec. 20.) With the adoption of the constitutions of 1848 and 1870, the property taxes were continued as the principal source of revenue and provided

most of the revenue for State and local purposes. However, in the constitution of 1848, specific authority was granted to the General Assembly to impose taxes upon occupations, franchises and privileges. This provision was carried over into section 1 of article IX of our present constitution, adopted in 1870, but was made subject to the limitation that such a tax could only be imposed "by general law, uniform as to the class upon which it operates." While franchise and privilege taxes have been used from time to time, the specific constitutional limitations upon the taxing power of the State were not considered by this court until 1932, following the enactment of a graduated income tax law. This court then stated that section 1 of article IX limited the taxing power of the General Assembly to "(1) property taxes on a valuation basis; (2) occupation taxes; and (3) franchise and privilege taxes." (*Bachrach* v. *Nelson*, 349 Ill. 579, at page 589.) Thereafter the legislature enacted the present Retailers' Occupation Tax Act (Ill. Rev. Stat. 1955, chap. 120, pars. 440-453) which imposed a tax upon the occupation of "selling tangible personal property to purchasers for use and consumption." The validity of this act was upheld in *Reif* v. *Barrett*, 355 Ill. 104, and thereafter the legislature no longer relied upon a property tax to provide funds for the various activities of the State. Since then tax revenues have been derived from the retailers' occupation tax and other occupational, franchise and privilege taxes imposed by the legislature. Winning, The Revenue System of Illinois, S. H. A. chap. 120, p. 1.

At the time of the enactment of the Retailers' Occupation Tax Act, the legislature had already levied an inheritance tax which was sustained as a privilege tax (*Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283; *Kochersperger* v. *Drake*, 167 Ill. 122), and a motor vehicle tax which was sustained as a tax upon the privilege of operating a motor vehicle upon public highways. (*People* v. *Deep*

Rock Oil Corp., 343 Ill. 388.) In 1941 the legislature also enacted the Cigarette Tax Act (Ill. Rev. Stat. 1955, chap. 120, pars. 453.1-453.30), which imposed an occupation tax upon persons engaged in business as distributors of cigarettes. While these sources of revenue were not objectionable as being violative of the constitution of Illinois (cf. *Winter* v. *Barrett*, 352 Ill. 441; *Bachrach* v. *Nelson*, 349 Ill. 579,) the Illinois legislature was still limited by the commerce clause of the constitution of the United States, which prohibited a sales tax or retailers' occupation tax which, when imposed on a transaction, burdened interstate commerce. (*Norton Co.* v. *Department of Revenue*, 340 U. S. 534.) The Illinois retailers' occupation tax could be avoided by the purchase of tangible personal property outside the State for use within the State.

This problem was common throughout the States of the nation, and in order to encompass this source of revenue, legislative draftsmen formulated a so-called "use tax" to obviate the proscription of the commerce clause of the United States constitution, and such tax has been repeatedly upheld as a tax "not upon the operations of interstate commerce, but upon the privilege of use after commerce is at an end." (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577.) A logical result of this distinction was the enactment of use taxes in 28 States for the purpose of gathering in revenue from transactions beyond the constitutional scope of their particular sales or retailers' occupation tax acts. (CCH State Tax Guides.) We think it clear, as all parties seem to concede, that the dominant purpose of the act before us was to complement the valid Retailers' Occupation Tax Act and remove the buyer's temptation to order merchandise in other States in an effort to escape payment of the tax on local sales. (*Johnson* v. *Halpin*, 413 Ill. 257.) The Illinois Use Tax Act therefore appears to have its genesis in the same considerations that gave rise to other

so-called "use tax" statutes. (*Miller Bros.* v. *State of Maryland*, 347 U. S. 340.) It now seems certain that the tax before us is inoffensive to the commerce clause of the Federal constitution. *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359.

No effort was made in Illinois to reach out-of-State purchases until the enactment of the Cigarette Use Tax Act in 1951. (Ill. Rev. Stat. 1955, chap. 120, pars. 453.31-453.67.) The constitutionality of this act was upheld in *Johnson* v. *Halpin*, 413 Ill. 257, and this decision led to the enactment of the present use-tax legislation. However, we made it clear when we struck down the motor vehicle use tax in *People ex rel. Schoon* v. *Carpentier*, 2 Ill. 2d 468, that a tax may not comply with the constitution merely because the legislature designates it a use tax.

We think it clear that the tax before us is not a property tax, nor is it a franchise or occupation tax. It must be sustained, if at all, as a tax upon a privilege. As such it must be "uniform as to the class upon which it operates."

With this historical background in mind, we turn to the attacks upon this particular act. We are not concerned with its wisdom, purpose, or benefits; the question before us is whether it complies with the Illinois and Federal constitutions.

The plaintiff urges that the tax does not meet the uniformity requirement of the constitution and that it is discriminatory in that it is imposed on users of tangible personal property purchased from retailers, as defined in the act, but not on users of property purchased from others; that the act imposes a tax upon purchasers from those engaged in the building trades, but not upon purchasers from other service occupations; and that the act provides for refunds to certain taxpayers returning property to retailers licensed under the act, but not to taxpayers who buy from others. Defendants answer that these discrimi-

nations are justified because the act is complementary to the retailers' occupation tax.

We think there is merit in plaintiff's contentions. The present retailers' occupation tax is levied upon the "occupation" of selling tangible personal property at retail for use and consumption. Since it embraces all persons engaged in such "occupation," it is clearly uniform upon the class on which it operates. (*Reif* v. *Barrett*, 355 Ill. 104.) This court invalidated a prior Retailers' Occupation Tax Act, as discriminatory and lacking in uniformity, which for the purposes of that act, declared that " 'tangible personal property' does not mean or include farm products or farm produce sold by the producer thereof * * *." (*Winter* v. *Barrett*, 352 Ill. 441, 459.) This court, in construing the Retailers' Occupation Tax Act, has held that the tax is only upon the occupation of selling tangible personal property at retail for use and consumption, and therefore has held it inapplicable to persons engaged in service occupations. (*Burroughs Co.* v. *Hollingsworth*, 415 Ill. 202; *Material Service Corp.* v. *Hollingsworth*, 415 Ill. 284; *Ingersoll Milling Machine Co.* v. *Department of Revenue*, 405 Ill. 367; *Svithiod Singing Club* v. *McKibbin*, 381 Ill. 194; *Mason* v. *Nudelman*, 377 Ill. 331; *Babcock* v. *Nudelman*, 367 Ill. 626.) The fact that these sales and transactions are without the scope of the act does not render the Retailers' Occupation Tax Act discriminatory and nonuniform since it levies a tax upon the occupation of selling tangible personal property at retail for use and consumption, and the service occupations that are not taxed are not within that occupational classification.

In the Use Tax Act now before us, however, the incident of taxation is not the occupation but "the privilege of using tangible personal property in this State." Section 2 of the Use Tax Act defines "use" as the "exercise by any person of any right or power over tangible personal prop-

erty incident to the ownership of that property." Section 3 of the act provides: "If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this State." This provision creates a class of tangible personal property users who are exempt from tax by virtue of the fact that they purchased such property from a seller who is not liable for a retailers' occupation tax on the sale in question. Section 2 of the act, however, removes users of personal property purchased from building contractors from such classification and declares that users of such property are not within such exempt class and are subject to the tax. While the uniformity clause of the Illinois constitution does not prohibit a use tax having exemptions and classifications, it does proscribe exemptions and classifications which are discriminatory or without a reasonable basis. Since the incident of use taxation is the use of tangible personal property, we can see no justification for a classification which exempts from such tax all persons who use such property merely because their seller is not taxable under the Retailers' Occupation Tax Act. If the tax is upon the use, why should a person using a suit purchased at a retail store bear the burden of the tax, while his neighbor who wears a tailor-made suit be exempt therefrom? Similar questions could be posed in connection with the other occupations classed as service occupations under the Retailers' Occupation Tax Act. In all of these cases the incident of taxation, the "use," is identical. The exempt classification created has no relation to the use of the property, but rather is bottomed on whether the person selling to the exempt taxpayer would have been obligated to pay a tax under the Retailers' Occupation Tax Act, and even this classification does not apply uniformly since the building contractor is removed therefrom.

We have held that a statutory classification resting upon substantial differences in kind, situation, or circumstance which is reasonably related to the legislative purpose does not offend the constitutional prohibition. (*Illinois Bell Telephone Co.* v. *Board of Review of Dept. of Labor*, 413 Ill. 37.) The uniformity required by section 1 of article IX of the Illinois constitution is that the classification must rest upon a reasonable basis and the legislation must apply uniformly to all members of the class. (*City of Chicago* v. *Willett Co.*, 1 Ill. 2d 311.) The Use Tax Act fails to meet these requirements. However, the defendants argue that it is constitutional for the sole reason that it is designed to complement the valid Retailers' Occupation Tax Act and prevent the avoidance of the payment of that tax. In so arguing, they place great emphasis on our recent decision in *Johnson* v. *Halpin*, 413 Ill. 257, where we sustained the Cigarette Use Tax Act on that basis. We do not consider the *Johnson case* applicable. In that case, the tax was laid uniformly upon the entire class of cigarette users under the provisions of the act; no user was exempt; and the ultimate result was that the economic burden was laid upon all Illinois users in the same amount.

The classification which the defendants here attempt to justify is not dependent upon a difference or distinction inherent in the use of property which is the incident of taxation. The difference is one that was created by the legislature in the Retailers' Occupation Tax Act. However, what is a legitimate classification when the incident of taxation is the occupation, is not necessarily a reasonable classification when the incident of taxation is the use of property. In resolving a similar issue in *Giebelhausen* v. *Daley*, 407 Ill. 25, at page 37, this court stated: "The principle applicable to a proper classification of persons subject to a law must rest on some difference which has a reasonable and just relation to the act in respect to which the classification is proposed."

The defendants argue that the complementary character of the act justifies its classifications. We are not impressed with this argument, and find that this tax is not in fact a complement to the retailers' tax. The Use Tax Act does not complete or make perfect the Retailers' Occupation Tax Act, instead it exempts a substantial class of users from the tax if their purchase is from a seller who is not liable for a retailers' occupation tax. A purchaser of personal property from a building contractor may be subject to a use tax while the building contractor would not be subject to a retailers' occupation tax. On the other hand, purchasers from vendors engaged in other service occupations, indistinguishable in their nature from that of a building contractor, would be exempt from the use tax as well as the retailers' occupation tax. Unlike use taxes enacted in other States, a user in Illinois is not exempt from taxation by the mere fact that a retailers' occupation tax is also paid on the same transaction. Under the Illinois act, the user must pay the tax, but this tax may be retained by the retailer who has paid a retailers' occupation tax. Clearly, this lack of uniformity as to the class on which it operates prevents this tax from equalizing the tax burden of the local retailers. (Cf. *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, 81 L. ed. 814; *Nelson* v. *Sears, Roebuck & Co.*, 312 U. S. 359, 85 L. ed. 888.) Accordingly, we hold that the Use Tax Act violates the uniformity provision of section 1 of Article IX of the constitution of Illinois.

Defendants further argue that if the classifications contained in the act are unreasonable, the exemptions granted are severable, and the entire act need not fall. Regardless of the severability provision of the act, if we cannot say that the legislative body would have passed the enactment with the invalid portions eliminated, the entire statute must be held invalid. (*City of Chicago Heights* v. *Public Service Co.*, 408 Ill. 604.) In the case at bar, the attempt to com-

plement the retailers' occupation tax is evident. To strike out the exemptions carved by the legislature would be to impose a tax upon users not intended to be included by the legislature, and would be, in effect, the imposition of a tax by this court. We consider the provisions of this act so mutually connected and dependent, as conditions, considerations, and compensations for each other, that the legislature intended them as a whole, and the entire act must fall. *Winter* v. *Barrett,* 352 Ill. 441.

The 1955 amendment to section IV of the Uniform Motor Vehicle Anti-Theft Act (Ill. Rev. Stat. 1955, chap. 95½, par. 77,) was enacted as a companion provision of the Use Tax Act. It provides that where an applicant seeks a certificate of title for a motor vehicle, he must exhibit a receipt to the Secretary of State evidencing the payment of the use tax due on account of the purchase. In view of our decision concerning the validity of the Use Tax Act, we likewise declare this amendment to be unconstitutional.

The brief of *amici curiae* earnestly urges that the use of personal property is not a "privilege" within the meaning of the Illinois constitution. This argument goes to the broad power of the legislature to enact use-tax legislation. Sections 1 and 2 of article IX of the Illinois constitution provide:

"§ 1. The general assembly shall provide such revenue as may be needful by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property—such value to be ascertained by some person or persons, to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll bridges, ferries, insurance, telegraph and express interests or business,

vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates.

"§ 2. The specification of the objects and subjects of taxation shall not deprive the general assembly of the power to require other subjects or objects to be taxed in such manner as may be consistent with the principles of taxation fixed in this constitution."

While we do not determine whether the use of personal property is such privilege, yet, subject to constitutional limitations, we find no prohibition in the foregoing sections of the revenue article against the enactment of such legislation. *Johnson* v. *Halpin*, 413 Ill. 257.

Other constitutional violations are urged, but need not be considered in view of our conclusion that the act lacks uniformity as to the class on which it operates. The decree of the circuit court dismissing the complaint must be reversed and the cause remanded with directions to grant the relief prayed.

Reversed and remanded, with directions.

APPENDIX D.

Second Opinion of the Illinois Supreme Court in Turner v. Wright, Together With the Dissenting Opinion.

Docket No. 34044—Agenda 36—January, 1957.

JOHN W. TURNER, JR., *Appellant*, v. WARREN T. WRIGHT, State Treasurer, *et al.*, *Appellees*.

MR. JUSTICE SCHAEFER delivered the opinion of the court:

The plaintiff, a resident of Illinois, bought an automobile in Indiana, brought it into Illinois and used it here. Under the terms of the Use Tax Act (Ill. Rev. Stat. 1955, chap. 120, pars. 439.1-439.18), a tax thereupon became due. He paid it under protest, and brought this action to secure a refund. The circuit court dismissed his complaint and he appeals.

The Use Tax Act was enacted in 1955. It imposes a tax "upon the privilege of using in this State tangible personal property purchased at retail * * * from a retailer:" (Section 3.) It applies whether the property is purchased in Illinois or elsewhere. The term "use" is defined basically to mean the exercise "of any right or power over tangible personal property incident to the ownership of that property." (Section 2.) The use tax is imposed at the same rate as the tax under the Retailers' Occupation Tax Act (Section 3; cf. Ill. Rev. Stat. 1955, chap. 120, par. 441.) It does not apply to out-of-State transactions that would not measure a tax under the Retailers' Occupation Tax Act if they occurred in Illinois, nor is it applicable to the use of property purchased outside of Illinois on which a sale or use tax has been paid to another State, to the extent of the tax so paid. (Section 3.) The tax is to be collected by the re-

tailer, but to the extent that a retailer remits the tax imposed by the Retailers' Occupation Tax Act, he is not required to remit the tax imposed by the Use Tax Act. (Section 9.) An out-of-State retailer may be licensed by the Department of Revenue to collect and remit the tax. (Section 6.) One who purchases from an out-of-State retailer who is not so licensed is required to pay the tax directly to the Department. (Section 10.) The act incorporates by reference many of the administrative provisions of the Retailers' Occupation Tax Act. (Section 12.)

The validity of the statute under the commerce clause of the Federal constitution is not challenged, but numerous other constitutional objections are advanced by the plaintiff and by *amici curiae* who were given permission to file a brief. The plaintiff concedes that the General Assembly has the power to pass a use tax, and directs his attack at specific provisions of the present act. *Amici curiae,* however, contend that the constitution of Illinois prohibits the passage of any general use tax. This is the most fundamental objection raised, and we consider it first.

The argument starts with the broad dictum of *Bachrach* v. *Nelson,* 349 Ill. 579, that the constitution restricts the taxing power of the General Assembly to (1) property taxes on an *ad valorem* basis, (2) occupation taxes and (3) franchise or privilege taxes. It is then pointed out that the present tax is obviously not a franchise or occupational tax, and that it cannot be sustained as a property tax because it is not levied on an *ad valorem* basis, or as a privilege tax because it does not involve conduct over which the General Assembly has "a special power of control."

The present tax purports to be a privilege tax, like the use taxes in effect in many other States. (129 A. L. R. 223; 153 A. L. R. 609.) Substantially the same argument that is made here was advanced against the Cigarette Use Tax Act in *Johnson* v. *Halpin,* 413 Ill. 257. The court there

analyzed the pertinent decisions and rejected the argument, saying: "On the basis of the foregoing analysis, it is apparent that the concept of 'privilege' with reference to the taxing power has not been limited in Illinois, or in other States, to conduct previously authorized by the legislature, or which the legislature could entirely abolish, or to benefits conferred by the State. For the right to use the streets and the highways, and the right to make *inter vivos* gifts which are effective at death, all of which have been sustained as taxable privileges in Illinois, were regarded as common rights open to all persons prior to legislative action thereon. Therefore, a taxable privilege may involve lawful rights and conduct enjoyed without previous legal authority, but over which the legislature has some power of control or classification. A tax upon such rights would be valid provided the classification were reasonable, and the statute provided for uniformity among the constituents of the class. *Harder's Storage Co.* v. *City of Chicago*, 235 Ill. 58.": 413 Ill. at 270.

In the *Johnson case* the court pointed to an additional ground upon which the Cigarette Use Tax could be sustained, saying: "Moreover, the selection of this particular privilege upon which to levy a tax is both reasonable and proper, since it is designed to complement the valid Cigarette Tax Act, and prevent the avoidance of the payment of that tax." (413 Ill. at 271.) The same considerations support the present tax.

It has been authoritatively said that "[m]any years of litigation have not resolved the uncertainties and ambiguities in the nonproperty provisions of Sections 1 and 2" of article IX of the constitution. (Cushman, Proposed Revision of Article IX, 1952 Ill. Law Forum, 226, 237.) Section 2 provides: "The specification of the objects and subjects of taxation shall not deprive the general assembly of the power to require other subjects or objects to be taxed

in such manner as may be consistent with the principles of taxation fixed in this constitution." This provision of the revenue article of the constitution has received varying interpretations. See, *e. g., Illinois Central Railroad Co.* v. *County of McLean*, 17 Ill. 291; *People* v. *Worthington*, 21 Ill. 170; *Raymond* v. *Hartford Fire Insurance Co.*, 196 Ill. 329; *Harder's Fire Proof Storage and Van Co.* v. *City of Chicago*, 235 Ill. 58; *Bachrach* v. *Nelson*, 349 Ill. 579; *Reif* v. *Barrett*, 335 Ill. 104; *Johnson* v. *Halpin*, 413 Ill. 257.

But the uncertainty that has persisted as to the precise scope of section 2 of article IX need not trouble us in this case. Use taxes were developed, as the plaintiff points out, to prevent evasion of the tax that applies when retail purchases are made within the State, and to protect the retail local merchant against diversion of his business to out-of-State sellers. Those are the purposes of the present tax. Such a protective tax can depend for its justification upon the tax that it supports. The principle is not new in our law. Upon this basis completed gifts *inter vivos* that are not subject to revocation have been included in the estate of the donor for inheritance tax purposes if they were made in contemplation of death. And the statute fixes a presumption that gifts made within two years of the donor's death were made in contemplation of it. (Ill. Rev. Stat. 1955, chap. 120, par. 375.) Such a provision has been regarded as necessary to protect the base of the inheritance tax. (See *Rosenthal* v. *People*, 211 Ill. 306; *In re Estate of Benton*, 234 Ill. 366; *People* v. *Danks*, 289 Ill. 542.) A supplemental tax so levied to protect an admittedly valid tax from evasion or avoidance is clearly, in our opinion, a tax that is "consistent with the principles of taxation fixed in this constitution." We hold, therefore, that the General Assembly is not without power to enact a use tax.

While the plaintiff concedes that the constitution does not prohibit the imposition of a complementary use tax, he

argues that the present statute is invalid. He points to the fact that other States that have use taxes impose them only upon the purchase of property outside the State for use within it, and he argues that the Illinois tax is not complementary because it falls upon purchases made within the State as well as upon those made outside, and thus introduces a new tax upon domestic transactions. The act requires the Illinois retailer to collect the use tax upon the sales he makes. It does not require him to remit that tax to the State, however, to the extent that he remits the retailers' occupation tax with respect to the sale of the same property. (Section 9.) Plaintiff also contends that this setoff provision provides for a gift of public funds to private individuals, permits the commutation of taxes and provides for the cancellation of a debt due to the State, all in violation of the constitution. Const., art. IX, secs. 6 and 7; art. IV, sec. 23.

The statute povides for a use tax that falls alike on those who purchase at retail within the State and those who purchase outside of it. That tax is to be collected by the Illinois retailer, but to the extent that he remits the tax due under the Retailers' Occupation Tax Act he is not required to remit the tax due under the Use Tax Act. The tacit assumption of the statute is that by this mechanism the tax advantage that was enjoyed by the buyer who purchased outside the State will be eliminated, without increasing the burden upon the buyer who purchases within the State. The accuracy of that assumption is not challenged. The Illinois retailer is required to remit one tax of 2½ per cent with respect to each sale within the State. That is the same tax that is levied with respect to each out-of-State purchase for use within the State. It is true that the scheme of this tax is more complex than that of a use tax that falls only on out-of-State purchases. But its purpose and its results are those of the typical use tax, and the formal differences in the method by which those pur-

poses are accomplished do not affect the validity of the statute.

It is not intended that both taxes shall reach the treasury with respect to a single transaction. It is intended and provided that one tax, and only one, shall reach the State treasury with respect to each purchase of property for use within the State, whether or not the purchase is made within Illinois. To that end the statute provides that the use tax collected by the retailer does not constitute a debt owed by him to the State when he "is relieved of the duty of remitting such tax to the Department by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act upon his gross receipts from the same transaction." (Section 8.) Only if the way in which the two taxes are interrelated is ignored is it possible to say that there is here a gift of public funds, commutation of taxes, or the cancellation of a debt owing to the State. The method by which the two taxes are integrated may be cumbersome, but it is not unconstitutional.

There is, however, one respect in which the use tax does not precisely complement the retailers' occupation tax. The former tax is based upon "selling price," the latter on "gross receipts" from sales. "Selling price" is defined in both statutes to mean the consideration for a sale valued in money whether received or paid in money or otherwise, "including cash, credits, service and property of every kind or nature * * *." (Ill. Rev. Stat. 1955, chap. 120, pars. 439.2, 440.) By an amendment in 1955, however, the definition of "gross receipts" in the Retailers' Occupation Tax Act was amended so that it "means the total selling price * * *, excluding therefrom any amount allowed as credit for tangible personal property taken in trade." (Ill. Rev. Stat. 1955, chap. 120, par. 440.) The result of this discrepancy in definitions is that in cases in which property is received in trade as a part of the purchase

price, the tax due may not be the same under the two statutes. For example, if a new car is purchased for $3000 and the buyer's old one is received in trade at $1000, the use tax will be $75. Under the Retailers' Occupation Tax Act, however, the value of the old car would not be included in the "gross receipts" on which the tax is computed, so that the tax would be $50. The retailer, however, is required to remit to the Department the full $75, because he is excused from remitting the use tax that he collects only to the extent that he remits the retailer's tax with respect to the same transaction. No discrimination between purchasers is involved in this situation, because each purchaser is required to pay the same amount as every other purchaser. And there is no unjust enrichment of the retailer for he is required to remit to the Department the full amount that he has collected. That the two taxes are not precisely identical therefore deprives no one of any constitutional rights.

The exemption provisions of the act are also attacked. The use tax falls on "the privilege of using in this State tangible personal property purchased at retail * * * from a retailer." The basic terms employed in the Use Tax Act are those used in the Retailers' Occupation Tax Act and, except in the instance just discussed, they are so defined as to make the scope of the two acts the same. In addition, section 3 of the Use Tax Act contains the following provision designed to limit the impact of the tax to those transactions that would measure a tax under the Retailers' Occupation Tax Act: "If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this State."

There are actions that the retailers' tax does not reach,

because although they involve the physical transfer of personal property at retail, the element of service is so pronounced that it has been thought to dominate the element of sale. (See, *e. g.*, *Mahon* v. *Nudelman*, 377 Ill. 331; *Huston Brothers Co.* v. *McKibbin*, 386 Ill. 479.) The use tax also exempts these transactions, and plaintiff argues that because it does so it is unconstitutional. While the distinctions that have been drawn are admitted to be relevant to an occupation tax upon retailers, they are said to be irrelevant, and therefore arbitrary and discriminatory, when included in a tax that falls upon the privilege of using property purchased at retail.

The argument would, we think, be persuasive if the use tax stood alone, for so far as use by the purchaser is concerned there is no distinction between a tailormade suit of clothes, for example, and one purchased at retail. But the tax before us does not stand alone. It is designed to complement and to protect the tax imposed upon the occupation of selling at retail, and the validity of its exemptions is to be determined in the light of that purpose. The question here is not whether the legislature is required to shape the use tax that it imposes to conform to the tax upon retailers, but whether it may constitutionally do so. We think that it may. The purpose of the use tax is to protect the base of the retailers' tax and the classification adopted is reasonably directed to this end. Whether the General Assembly could go further and broaden the base of the use tax beyond the limits of the occupation tax upon retailers is not before us.

In addition to his general attack upon the exemption scheme of the use tax, the plaintiff also challenges one particular exemption. In 1955 the General Assembly amended the Retailers' Occupation Tax Act so that the tax would reach tangible personal property in a finished form that was transferred in connection with a sale of

real estate or a building construction contract, but did not become a part of the real estate, such as bathtubs, stoves, refrigerators and the like. (Ill. Rev. Stat. 1955, chap. 120, par. 440.) To correlate the two taxes, the Use Tax Act includes a provision, in substantially the same language, bringing these same transactions within the scope of the use tax. (Section 1.) It is argued that the inclusion of this provision makes an invalid subclassification among those engaged in service enterprises, and that this subclassification makes the statute invalid. The distinction that the provision draws appears to be, as the plaintiff says, between the sale of personal property in a finished form, as in the instances enumerated, and its sale in an unfinished form. We are unable to see wherein such a distinction is improper. In any case, so far as the use tax is concerned, this particular provision stands upon no different footing than the others that are designed to correlate the two statutes. If there is vice in the provision as it appears in the Retailers' Occupation Tax Act, the attack should be directed at that act, and not at the statute designed to complement it.

The title of the Use Tax Act is: "An Act in relation to a tax upon the privilige of using tangible personal property in this State, to make appropriations to the Department of Revenue and to the Secretary of State in connection therewith and to make certain incidental but necessary corollary changes as an enforcement aid in the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933, as amended, by amending Section 4 of said Uniform Motor Vehicle Anti-Theft Act." It is attacked under section 13 of article IV of the constitution on the grounds (1) that it includes two subjects, (2) that its title does not express the subject matter of the act and (3) that it introduces a new subject into the Uniform Motor Vehicle Anti-Theft Act. So far as we can ascertain, the validity of a title

that describes the provisions of an independent piece of legislation and also expressly amends an existing act has not been passed on by this court. The adjustments necessary to fit a new statute into the existing legislative scheme have heretofore been made by companion bills. In the only case that we are aware of that involved a statute in which a similar technique was used (*Routt* v. *Barrett*, 396 Ill. 322), the present question was not raised.

Section 13 of article IV provides: "No act hereafter passed shall embrace more than one subject, and that shall be expressed in the title. But if any subject shall be embraced in an act which shall not be expressed in the title, such act shall be void only as to so much thereof as shall not be so expressed; and no law shall be revived or amended by reference to its title only, but the law revived, or the section amended, shall be inserted at length in the new act." This requirement prevents logrolling, and by limiting the contents of a bill to a single subject it outlaws legislative "riders," and so protects the veto power of the Governor against encroachment. I Debates and Proceedings of Illinois Constitutional Convention (1870), p. 536; *St. Louis* v. *Tiefel*, 42 Mo. 578; *Commonwealth* v. *Barnett*, 199 Pa. 161, 48 Atl. 976.

We think that it is clear that all of the provisions of the act deal with a single subject,—the imposition of a use tax,—which is clearly expressed in its title. Appropriations to enforce the act are germane to that subject. The amendment to section 4 of the Uniform Motor Vehicle Anti-Theft Act provides that the Secretary of State shall not issue a certificate of title for a motor vehicle unless the applicant furnishes a receipt showing that the use tax has been paid, or establishes that no tax is due. Such a provision is obviously relevant to the enforcement of the use tax.

But it is also argued that the Uniform Motor Vehicle Anti-Theft Act, as it stood before the amendment to section

4, dealt with a subject entirely unrelated to any tax, and that the amendment introduces into that act extraneous matter that is foreign to its title. The title of the Uniform Motor Vehicle Anti-Theft Act (Ill. Rev. Stat. 1955, chap. 95½,) is "An Act in relation to the prevention of the theft of motor vehicles by requiring certificates of title for registered motor vehicles and the license of dealers in used motor vehicles, trailers, semi-trailers and parts thereof." The new provision introduced by the amendment relates to the issuance of certificates of title by the Secretary of State and so it falls within the title of the act. Evidence that the use tax has been paid or is not due will also show from whom the car was acquired and so will aid the Secretary of State in ascertaining that it was legitimately acquired. The legislative technique here used invites close scrutiny. It has an inherent potential that, if not closely confined, would trespass upon the objections of the constitutional provision. In this instance, however, the provision in question is germane both to the new statute and to the statute that is amended, and so it does not conflict with the constitution.

Plaintiff's remaining objections can be shortly stated and shortly disposed of. A purchaser who does not pay the tax to a retailer is required, under penalty, to file a return with the Department of Revenue. The statute does not prescribe the form of a return, and does not in so many words authorize the Department to do so, and plaintiff argues that it therefore violates the due process clause. There is little room for debate as to what is to be contained in a return under the act. The authority of the Department to administer the act is expressly stated in many of its provisions, and it is implicit throughout all of them. That authority is adequate to authorize the Department to prescribe a form of return.

Section 12 of the act incorporates, by reference to their

numbers and to the subjects with which they deal, sixteen sections of another statute, but does not identify by title the statute that contains the sixteen sections. Plaintiff argues that the act is therefore fatally vague and indefinite. The argument is without merit because section 12 makes it unmistakably clear, by capsule references to the matters dealt with in the incorporated sections, that those sections are in the Retailers' Occupation Tax Act. And even without the references to specific subjects, a reading of the statute as a whole would remove any reasonable doubt.

In our opinion the circuit court properly sustained the validity of the statute, and its decree is affirmed.

Decree affirmed.

Mr. JUSTICE DAVIS, dissenting:

I voice my dissent to what I believe to be an unprecedented opinion by the court. My conclusion is neither predicated on the wisdom or folly of the legislation, nor on what the court describes as its "cumbersome" methods, but rather is based on the conviction that the legislature has failed to enact a valid, uniform privilege tax within the limitations of the revenue article of our constitution. Const., art. IX, secs. 1 and 2.

If I interpret the decision correctly, the court implicitly concedes that the Use Tax Act, if it stood alone, would be unconstitutional for lack of uniformity, but find justification for this lack of uniformity in the legislature's purpose to protect the base of the retailers' tax. Indeed it appears that the court's decision is based on the assertion that "a protective tax can depend for its justification upon the tax that it supports."

I can find nothing in the revenue article nor in our decisions to indicate that a general protective purpose will

render a tax immune to constitutional objections. The court points to the tax on gifts in contemplation of death as one enacted for the purpose of protecting the base of the State inheritance tax. But I know of no case, including those cited by the court, which indicates that such a protective tax could be upheld regardless of its uniformity, or without being a tax upon a privilege. Thus, the court holds that while the legislature could not constitutionally enact the present use tax standing alone, since it first enacted a valid retailers' tax, with classifications peculiar to that occupation, it may now protect that tax by enacting a use tax without regarding constitutional requirements. Under this pronouncement, if the retailers' tax were repealed or substantially changed, those who use property in Illinois would be subjected to a clearly non-uniform and discriminatory tax. Such an objection was sufficient to strike down the Motor Vehicle Use Tax Act in *People ex rel. Schoon* v. *Carpentier*, 2 Ill. 2d 468, at 475-476, where we held: "It is contended that this tax is similar to that in the Cigarette Use Tax Act and that the act is valid as levying a complementary tax to that levied by the Retailers' Occupation Tax Act. Our decision in *Johnson* v. *Halpin*, 413 Ill. 257, is cited in support of this contention. That case can offer no such support as it is evident that there is a salient difference between the Motor Vehicle Use Tax Act and the Cigarette Use Tax Act. A review of the statutes will reveal that the former (by the Secretary's construction) provides for no general tax upon all users of motor vehicles in this State. If the Retailers' Occupation Tax Act were repealed or substantially changed those who bought motor vehicles from Illinois dealers would escape the burden of this use tax. However, as pointed out in *Johnson* v. *Halpin*, 413 Ill. 257, the cigarette use tax is a tax on the local use of cigarettes and in no way discriminates against purchasers

who buy their cigarettes outside of the State, since they pay the same tax as purchasers from Illinois distributors."

Nor can the court find precedent in *Johnson* v. *Halpin*, 413 Ill. 257, upholding the Cigarette Use Tax Act. In that case we pointed out that the operation of the act was uniform and nondiscriminatory among all users of cigarettes, and stated at page 270: "Therefore, a taxable privilege may involve lawful rights and conduct enjoyed without previous legal authority, but over which the legislature has some power of control or classification. A tax upon such rights would be valid provided the classification were reasonable, and the statute provided for uniformity among the constituents of the class. *Harder's Storage Co.* v. *City of Chicago*, 235 Ill. 58." We also stated at page 271: "However, as a privilege tax it must still conform to the constitutional requirements of uniformity as to the class upon which it operates." That opinion further recited that the cigarette use tax was levied upon the privilege of using cigarettes in this State, a privilege which the State could control or abolish, and I believe that fact, as well as the complementary nature of the act, persuaded the court to sustain the constitutionality of the enactment.

Section 1 of the revenue article requires that a privilege tax must be "uniform as to the class upon which it operates." (Const., art. IX, sec. 1.) The provisions of section 2 of article IX have never been thought to eliminate this requirement. In *Ohio Oil Co.* v. *Wright*, 386 Ill. 206, 220, we stated: "We have held that these two provisions do not prevent the legislature from placing a tax on some other business or occupation than that specifically enumerated in section 1. (*Winter* v. *Barrett*, 352 Ill. 441; *Bachrach* v. *Nelson*, 349 Ill. 579; *Bessette* v. *People*, 193 Ill. 334.) However, such tax must be uniform as to the class upon which it operates, as is expressly provided by the constitution. A tax upon the occupation of producing oil is just as logi-

cal and valid a classification as is the occupation of engaging in the retail sale of tangible personal property for use or consumption, but like that tax it must operate uniformly upon a class. The designation of the persons composing a class may not be arbitrary or capricious, and uniformity may be violated by including those in fact not within the class, (*Banghart* v. *Walsh*, 339 Ill. 132; *Wedesweiler* v. *Brundage*, 297 Ill. 228; *Scully* v. *Hallihan*, 365 Ill. 185; *Svithiod Singing Club* v. *McKibbin*, 381 Ill. 194,) as well as by excluding those properly within it. *Lippman* v. *People*, 175 Ill. 101; *Winter* v. *Barrett*, 352 Ill. 441; *City of Chicago* v. *Ames* 365 Ill. 529."

But the court has now announced that the legislature may disregard uniformity and all other constitutional limitations provided the tax has the purpose of protecting another tax. The scope of this newly declared legislative taxing power is far beyond the constitutional proscriptions heretofore recognized.

The court announced a further dangerous doctrine in sloughing off plaintiff's objection to the subclassification of the sale of personal property in connection with sales of real estate or building contracts. It stated that "If there is vice in the provision as it appears in the Retailers' Occupation Tax Act, the attack should be directed at that act, and not at the statute designed to complement it." Thus, a taxpayer is denied the right to constitutionally attack a void requirement of a complementary act, when the principal statute contains a similar invalid provision. This is, to the best of my knowledge, the first pronouncement by this court of this novel legal principle, which I regard as violative of the constitutional rights of the plaintiff.

While sustaining the use tax because of its complementary character, the court permits that tax to actually raise the base of the retailers' tax. The retailers' tax

base is on "gross receipts" which excludes credit given for property taken in trade. The use-tax base is the selling price which disregards the value of such "trade-ins." Under the court's interpretation, the use tax increases the tax on all "trade-in" transactions, while not affecting the retailers' tax on "non-trade-in" transactions. This result obtains since the retailer is excused from remitting the use tax that he collects only to the extent that he remits the retailers' tax with respect to the same transaction. Thus, retailers will be required to pay a tax based on the full value of the article sold, without excluding therefrom the value of any merchandise "traded in." The court ignores the fact that, with respect to the tax increase on these transactions, the tax is not complementary but is entirely new.

The effect of the court's decision seems to be that once a tax is enacted for the general purpose of protecting a prior tax the subsequent tax (1) need not meet constitutional limitations, (2) cannot be constitutionally attacked if it complements similar provisions of the prior act, and (3) can go further than protection and can create an entirely new tax.

While the purpose of the use tax may be desirable, it can be justified only as a tax on a privilege; and it must therefore be uniform as to the class on which it operates. I am convinced that the classifications and exemptions of the Use Tax Act do not comply with the requirement of uniformity (*City of Chicago* v. *Willett Co.*, 1 Ill. 2d 311; *Johnson* v. *Halpin*, 413 Ill. 257; *Winter* v. *Barrett*, 352 Ill. 441) and that it must stand or fall on its own merits. *People ex rel. Schoon* v. *Carpentier*, 2 Ill. 2d 468.

I am mindful of the limitations of our revenue article, and the ever increasing monetary needs of government, but the exigencies of the situation offer no reason for this court to approve this legislation. While, with some mis-

givings, I concede that this is a tax upon a privilege within the meaning of the revenue article, I must dissent from the doctrine that a complementary or protective tax is exempt from the provisions of our basic charter. The court's decision has effectively removed many of the basic constitutional limitations on the taxing power. If this is to be done, it should be by a well considered constitutional amendment and not by fiat of this court.

APPENDIX E.

The Illinois Use Tax Act.

An Act in relation to a tax upon the privilege of using tangible personal property in this State, to make appropriations to the Department of Revenue and to the Secretary of State in connection therewith and to make certain incidental but necessary corrollary changes as an enforcement aid in the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933 as amended, by amending Section 4 of said Uniform Motor Vehicle Anti-Theft Act.

Be it enacted by the People of the State of Illinois, represented in the General Assembly:

§1. This Act shall be known and may be cited as the "Use Tax Act".

§2. "Use" means the exercise by any person of any right or power over tangible personal property incident to the ownership of that property, except that it shall not include the sale or use for demonstration by him of that property in any form as tangible personal property in the regular course of business. "Use" shall not mean the interim use of tangible personal property by a retailer before he sells such tangible personal property and shall not mean the physical incorporation of tangible personal property, as an ingredient or constituent, into other tangible personal property (a) which is sold in the regular course of business or (b) which the person incorporating such ingredient or constituent therein has undertaken at the time of such purchase to cause to be transported in Interstate Commerce to distinations [destinations] outside the State of Illinois.

"Purchase at retail" means the acquisition of the ownership of, or title to, tangible personal property, through a sale at retail.

"Purchaser" means any person who through a sale at retail acquires the ownership of or title to the tangible personal property that is sold.

"Sale at retail" means any transfer of the ownership of, or title to, tangible personal property to a purchaser, for use, and not for resale, and for a valuable consideration. Transactions whereby the possession of the property is transferred but the seller retains the title as security for payment of the selling price shall be deemed to be sales.

"Selling price" means the consideration paid for a sale valued in money whether received or paid in money or otherwise, including cash, credits, service and property of every kind or nature and shall be determined without any deduction on account of the cost of the property sold, the cost of materials used, labor or service cost or any other expense whatsoever, but shall not include interest or finance charges which appear as separate items on the bill of sale or sales contract and shall not include charges that are added to prices by sellers on account of the seller's tax liability under the Retailers' Occupation Tax Act, or on account of the seller's duty to collect, from the purchaser, the tax that is imposed by this Act, or on account of the seller's tax liability under the Municipal Retailers' Occupation Tax Act.

"Department" means the Department of Revenue.

"Person" means any natural individual, firm, partnership, association, joint stock company, joint adventure, public or private corporation, or a receiver, executor, trustee, conservator or other representative appointed by order of any court.

"Retailer" means and includes every person engaged in

the business of selling tangible personal property for use, and not for resale in any form.

The isolated or occasional sale of tangible personal property at retail by a person who does not hold himself out as being engaged (or who does not habitually engage) in selling such tangible personal property at retail does not make such person a retailer hereunder; provided that any person who is engaged in a business which is not subject to the tax imposed by the Retailers' Occupation Tax Act because of involving the sale of or a contract to sell real estate or a construction contract to improve real estate, but who, in the course of conducting such business, transfers tangible personal property to users or consumers in the finished form in which it was purchased, and which does not become real estate, under any provision of a construction contract or real estate sale or real estate sales agreement entered into with some other person arising out of or because of such nontaxable business, shall be considered to be a retailer to the extent of the value of the tangible personal property so transferred. If, in such a transaction, a separate charge is made for the tangible personal property so transferred, the value of such property, for the purposes of this Act, shall be the amount so separately charged, but not less than the cost of such property to the transferor; if no separate charge is made, the value of such property, for the purposes of this Act, shall be the cost to the transferor of such tangible personal property.

"Retailer maintaining a place of business in this State", or any like term, shall mean and include any retailer having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business

or agent is located here permanently or temporarily, or temporarily, or whether such retailer or subsidiary is licensed to do business in this State.

§3. A tax is imposed upon the privilege of using in this State tangible personal property purchased at retail on and after August 1, 1955, from a retailer. Until and including June 30, 1957, such tax is at the rate of 2½% of the selling price of such property; and after June 30, 1957, at the rate of 2% of such selling price.

The tax hereby imposed shall be collected from the purchaser by a retailer maintaining a place of business in this State or a retailer authorized by the Department pursuant to Section 6 hereof, and remitted to the Department, pursuant to the provisions of Section 9 hereof.

The tax hereby imposed and not paid to a retailer pursuant to the preceding paragraph of this Section shall be paid to the Department directly by any person using such property within this State, pursuant to the provisions of Section 10 hereof.

Retailers shall collect the tax from users by adding the tax to the selling price of tangible personal property, when sold for use, in the manner prescribed by the Department. The Department shall have the power to adopt and promulgate reasonable rules and regulations for the adding of such tax by retailers to selling prices by prescribing bracket systems for the purpose of enabling such retailers to add and collect, as far as practicable, the amount of such tax.

The tax herein imposed shall not apply to the State of Illinois, any county, political subdivision or municipality thereof, or to any instrumentality or institution of any of the governmental units aforesaid, or to any corporation, society, association, foundation, or institution organized and operated exclusively for charitable, religious or edu-

cational purposes, when using tangible personal property purchased at retail.

To prevent actual or likely multistate taxation, the tax herein imposed shall not apply to the use of tangible personal property in this State under the following circumstances:

(a) The use, in this State, of tangible personal property acquired outside this State by a nonresident individual and brought into this State by such individual for his or her own use while temporarily within this State or while passing through this State;

(b) the use, in this State, of tangible personal property which is acquired outside this State and which is moved into this State for use as rolling stock moving in interstate commerce;

(c) the use, in this State, of tangible personal property which is acquired outside this State and caused to be brought into this State by a person who has already paid a tax in another state in respect to the sale, purchase or use of such property, to the extend [extent] of the amount of such tax so paid in such other state;

(d) the temporary storage, in this State, of tangible personal property which is acquired outside this State and which, subsequent to being brought into this State and stored here temporarily, is used solely outside this State or physically attached to or incorporated into other tangible personal property that is used solely outside this State.

If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this State.

§ 4. Evidence that tangible personal proprty was sold

by any person for delivery to a person residing or engaged in business in this State shall be prima facie evidence that such tangible personal property was sold for use in this State.

§ 5. Every retailer maintaining a place of business in this State and making sales of tangible personal property for use in this State (whether such sales are made within or without this State) shall, when collecting the tax as provided in Section 3 of this Act from the purchaser, give to the purchaser (if demanded by the purchase [purchaser]) a receipt therefor in the manner and form prescribed by the Department. Such receipt shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer. Each such retailer shall list with the Department the names and addresses of all his agents operating in this State and the locations of any and all of his distribution or sales houses, offices or other places of business in this State.

§ 6. A retailer maintaining a place of business in this State, if required to register under the Retailers' Occupation Tax Act, need not obtain an additional Certificate of Registration under this Act, but shall be deemed to be sufficiently registered by virtue of his being registered under the Retailers' Occupation Tax Act. Every retailer maintaining a place of business in this State, if not required to register under the Retailers' Occupation Tax Act, shall apply to the Department (upon a form prescribed and furnished by the Department) for a Certificate of Registration under this Act. In completing such application, the applicant shall furnish such information as the Department may reasonably require. Upon approval of an application for Certificate of Registration, the Department shall issue, without charge, a Certificate of Registration to the applicant. Such Certificate of Registration shall be displayed at the address which the appli-

cant states in his application to be the principal place of business or location from which he will act as a retailer in this State. If the applicant will act as a retailer in this State from other places of business or locations, he shall list the addresses of such additional places of business or locations in this application for Certificate of Registration, and the Department shall issue a Sub-Certificate of Registration to the applicant for each such additional place of business or location. Each Sub-Certificate of Registration shall be conspicuously displayed at the place for which it is issued. Such Sub-Certificate of Registration shall bear the same registration number as that appearing upon the Certificate of Registration to which such Sub-Certificates relate. Where a retailer operates more than one place of business which is subject to registration under this Section and such businesses are substantially different in character or are engaged in under different trade names or are engaged in under other substantially dissimilar circumstances (so that it is more practicable, from an accounting, auditing or bookkeeping standpoint, for such businesses to be separately registered), the Department may require or permit such person to apply for and obtain a separate Certificate of Registration for each such business or for any of such businesses instead of registering such person, as to all such businesses, under a single Certificate of Registration supplemented by related Sub-Certificates of Registration. No Certificate of Registration shall be issued to any person who is in default to the State of Illinois for moneys due hereunder.

The Department may, in its discretion, upon application, authorize the collection of the tax herein imposed by any retailer not maintaining a place of business within this State, who, to the satisfaction of the Department, furnishes adequate security to insure collection and pay-

ment of the tax. Such retailer shall be issued, without charge, a permit to collect such tax. When so authorized, it shall be the duty of such retailer to collect the tax upon all tangible personal property sold to his knowledge for use within this State, in the same manner and subject to the same requirements, including the furnishing of a receipt to the purchaser (if demanded by the purchaser), as a retailer maintaining a place of business within this State. The receipt given to the purchaser shall be sufficient to relieve him from further liability for the tax to which such receipt may refer. Such permit may be revoked by the Department as provided herein.

§7. It is unlawful for any retailer to advertise or hold out or state to the public or to any purchaser, consumer or user, directly or indirectly, that the tax or any part thereof imposed by Section 3 hereof will be assessed or absorbed by the retailer or that it will not be added to the selling price of the property sold, or if added that it or any part thereof will be refunded other than when the retailer refunds the selling price and tax because of the merchandise's being returned to the retailer or other than when the retailer credits or refunds the tax to the purchaser to support a Claim for Credit under the Retailers' Occupation Tax Act. Any person violating any of the provisions of this Section within this State shall be guilty of a misdemeanor and subject to the penalties provided in this Act.

§ 8. The tax herein required to be collected by any retailer pursuant to this Act, and any such tax collected by any retailer shall constitute a debt owed by the retailer to this State, except when such retailer is relieved of the duty of remitting such tax to the Department [by virtue of his being required to pay the tax imposed by the Re]tailers' Occupation Tax Act upon his gross receipts from the same transaction.

§ 9. Each retailer required or authorized to collect the tax herein imposed shall pay to the Department the amount of such tax (except as otherwise provided), on or before the 15th day of the month following the calendar month during which such tax was collected. The first such remittance shall be due on or before September 15, 1955, for the tax collected during the preceding calendar month, but a retailer need not wait [remit] that part of any tax collected by him to the extent that he is required to remit and does remit the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property.

Where such tangible personal property is sold under a conditional sales contract, or under any other form of sale wherein the payment of the principal sum, or a part thereof, is extended beyond the close of the month for which the return is filed, the retailer, in collecting the tax (except when such a procedure would make compliance with Section 4 of the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933, as amended, impossible or impracticable), may collect, for each month, only the tax applicable to that part of the selling price actually received during such month.

On or before the 15th day of each month, such retailer shall also file a return for the preceding calendar month, the first such return being due by September 15, 1955, covering the preceding calendar month.

Where a retailer collects the tax with respect to the selling price of tangible personal property which he sells and the purchaser thereafter returns such tangible personal property and the retailer refunds the selling price thereof to the purchaser, such retailer shall also refunds, to the purchaser, the tax no [so] collected from the purchaser. When filing his return for the month in which he refunds such tax to the purchaser, the retailer may

deduct the amount of the tax so refunded by him to the purchaser from any other use tax which such retailer may be required to pay or remit to the Department, as shown by such return, provided that the amount of the tax to be deducted shall previously have been remitted to the Department by such retailer. If the retailer shall not previously have remitted the amount of such tax to the Department, he shall be entitled to no deduction hereunder upon refunding such tax to the purchaser.

Any retailer filing a return hereunder shall also include (for the purpose of paying tax thereon) the total tax covered by such return upon the selling price of tangible personal property purchased by him at retail from a retailer, but as to which the tax imposed herein was not collected from the retailer filing such return, and such retailer shall remit the amount of such tax to the Department when filing such return.

If experience indicates such action to be practicable, the Department may prescribe and furnish a combination or joint return which will enable retailers, who are required to file returns hereunder and also under the Retailers' Occupation Tax Act, to furnish all the return information required by both Acts on the one form.

Where the retailer has more than one business registered with the Department under separate registration hereunder, such retailer shall not file each return that is due as a single return covering all such registered businesses, but shall file separate returns monthly for each such registered business.

In his return, the retailer shall determine the value of any consideration other than money received by him in connection with the sale of any tangible personal property in the course of his business and he shall include such value in his return. Such determination shall be subject to review and revision by the Department in the

manner hereinafter provided for the correction of returns.

All moneys received by the Department hereunder shall be paid into the General Revenue Fund of the State Treasury.

§ 10. When tangible personal property is purchased from a retailer for use in this State by a purchaser who did not pay the tax herein imposed to the retailer, and who does not file returns with the Department as a retailer under Section 9 of this Act, such purchaser (by the 15th day of the month following the calendar month in which such purchaser makes any payment upon the selling price of such property) shall file a return with the Department and pay the tax due upon that portion of the selling price so paid by the purchaser during the preceding calendar month. Such return and payment from the purchaser shall be submitted to the Department sooner than the 15th of the month after the month in which the purchase is made to the extent that that may be necessary in order to secure the title to a motor vehicle under Section 4 of the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933, as amended. To the extent to which they may be pertinent, all of the provisions of Section 9 with reference to returns and payments shall be applicable to the returns and payments herein required. When a purchaser pays a tax herein imposed directly to the Department, the Department (upon request therefor from such purchaser) shall issue an appropriate receipt to such purchaser showing that he has paid such tax to the Department. Such receipt shall be sufficient to relieve the purchaser from further liability for the tax to which such receipt may refer.

§ 11. Every retailer required or authorized to collect taxes hereunder and every person using in this State tangible personal property purchased at retail from a retailer on or after the effective date hereof shall keep

such records, receipts, invoices and other pertinent books, documents, memoranda and papers as the Department shall require, in such form as the Department shall require. For the purpose of administering and enforcing the provisions hereof, the Department, or any officer or employee of the Department designated, in writing, by the Director thereof, may hold investigations and hearings concerning any matters covered herein and may examine any books, papers, records, documents or memoranda of any retailer or purchaser bearing upon the sales or purchases of tangible personal property, the privilege of using which is taxed hereunder, and may require the attendance of such person or any officer or employee of such person, or of any person having knowledge of the facts, and may take testimony and require proof for its information.

§ 12. All of the provisions of Sections 2b, 4 (except that the time limitation provisions shall run from the date when the tax is due rather than from the date when gross receipts are received), 5 (except that the time limitation provisions on the issuance of proposed assessments shall run from the date when the tax is due rather than from the date when gross receipts are received), 5a, 5b, 5c (with the authority contained therein for the releasing of liens against retailers being applicable to the same extent and on the same conditions in this Act to the releasing of liens against users as well as to the releasing of liens against retailers), 5d, 5e, 5f (with the provision contained therein concerning the inclusion of the name of the "retailer" in a published notice and the provision contained therein requiring notice by registered mail to the "retailer" being applicable in this Act also to a user where the property to which the lien applies belongs to a user), 5g, 7, 8, 9, 10, 11, 12 and 12½ in effect on the effective date of this Act, as subsequently amended,

which are not inconsistent with this Act, shall apply, as far as practicable to the subject matter of this Act to the same extent as if such provisions were included herein.

§ 13. Whenever any retailer not maintaining a place of business in this State, to whom a permit to collect the tax hereby imposed has been issued pursuant to Section 6 hereof, fails to comply with any of the provisions hereof or any orders, rules or regulations of the Department prescribed and adopted hereunder, or when the Department considers the security furnished by such retailer to be inadequate or considers that the tax can be collected more effectively from persons using such property in this State, the Department may, upon notice and hearing as herein provided, by order revoke the permit issued to such retailer. No order authorized by this Section shall be made until the retailer is given an opportunity to be heard and to show cause why such order shall not be made, and he shall be given at least 7 days' notice of the time, place and purpose of such hearing. The Department shall have the power in its discretion to issue a new permit pursuant to Section 6 hereof after such revocation.

§ 14. Any person subject to the provisions hereof who fails to file a return, or who violates any other provision of Section 9 or Section [10] hereof, or who fails to keep books and records as required herein, or who files a fraudulent return, or who wilfully violates any rule or regulation of the Department for the administration and enforcement of the provisions hereof, or any officer or agent of a corporation subject hereto who signs a fraudulent return filed on behalf of such corporation, or any person who violates any of the provisions of Sections 3, 5 or 7 hereof, is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than $25.00 nor more than $5,000.00, or be imprisoned in the county jail for not less than 1 month nor more than 6 months, or be both so fined and imprisoned in the discretion of the court.

Any person who violates any provision of Section 6 hereof is guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than $25.00 nor more than $500.00 or be imprisoned in the county jail not more than 6 months, or be both so fined and imprisoned, in the discretion of the court. Each and every day any such person is engaged in the business in violation of said Section 6 shall constitute a separate offense.

This Section shall not apply if the violation in a particular case also constitutes a criminal violation of the Retailers' Occupation Tax Act.

§ 15. The tax herein imposed shall be in addition to all other occupation or privilege taxes imposed by the State of Illinois or by any municipal corporation or political subdivision thereof.

§ 16. The sum of $500,000, or so much thereof as may be necessary, is appropriated to the Depatment of Revenue for the ordinary and contingent expenses of said Department in administering the provisions of this Act. The amounts expended from said appropriation for personal services shall be available only for compensation of positions classified under "An Act to standardize State position titles and salary rates," approved June 30, 1943, as amended. No contract shall be entered into or obligation incurred for any expenditure for contingencies from the appropriation herein made until after the purpose and amount of such expenditure has been approved in writing by the Governor. All printing and postage purchased from the above appropriation shall be secured through the Department of Finance, and all stamps shall be perforated for identification purposes by the Department of Finance before delivery to the Department of Revenue. The appropriation herein made is subject to the provisions of "An Act in relation to State finance," approved June 10, 1919, as amended. Not more than seventy-five per cent (75%)

of the appropriation made in this Section shall be expended or encumbered from the date that this Act becomes effective to the first day of January of the year in which the next regular session of the General Assembly shall convene. Provided, that this limitation shall not apply to the appropriation made in this Section when used for the following objects and purposes: Equipment, contractual services, commodities, contingencies, stationery and printing and office supplies.

§17. The sum of $100,000, or so much thereof as may be necessary, is appropriated to the Secretary of State for the performance of his duties in relation to this Act under Section 4 of the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933, as amended. The appropriation made in this Section is subject to the provisions of "An Act in relation to State finance", approved June 10, 1919, as amended.

§ 18. If any clause, sentence, Section, provision or part of this Act or the application thereof to any person or circumstance shall be adjudged to be unconstitutional, the remainder of this Act or its application to persons or circumstances other than those to which it is held invalid, shall not be affected thereby. In particular, if any provision which exempts or has the effect of exempting some class of users or some kind of use from the tax imposed by this Act should be held to constitute or to result in an invalid classification or to be unconstitutional for some other reason, such provision shall be deemed to be severable, with the remainder of this Act without said provision being held constitutional.

§ 2. Section 4 of the Uniform Motor Vehicle Anti-Theft Act, approved May 11, 1933, as amended, is amended to read as follows:

§ 4. (a) The application for a certificate of title properly sworn to, shall be made upon the appropriate form furnished or approved by the Secretary of State and shall

contain a full description of the motor vehicle including the trade name or the name of the maker, the engine and serial numbers of the vehicle identification number in lieu of the engine and serial numbers and any distinguishing marks thereon and whether the motor vehicle is new or used, together with a statement of the applicant's title and whether possession is held by right of title, lease, conditional sale, mortgage or other agreement, and of any interest in or lien or encumbrances upon said motor vehicle and the name and address of the person holding such interest, lien or encumbrance and the name and address of the person to whom the certificate of title shall be delivered and such other information as the Secretary of State may require, and every application shall be accompanied by a fee of 50¢, which shall be in addition to any fee charged for the registration of such motor vehicle.

An application for a certificate of title for a new motor vehicle shall be accompanied by the certificate prescribed in Section 3a.

An application for a certificate of title for any motor vehicle must be accompanied by proof either that no tax imposed pursuant to the "Use Tax Act" is owing by reason of the use of such motor vehicle in Illinois or that any tax so imposed has been paid. A receipt issued pursuant to such Act shall be proof of payment of such tax. In the absence of proof of payment or of non-liability, no certificate of title shall be issued to such applicant.

(b). Whenever application is made for a certificate of title for a motor vehicle for which a certificate of title has not previously been issued in this State, such application shall include a bill of sale or statement of transfer by the seller and of any lien retained by such seller. The sale or transfer of a motor vehicle for which a certificate of title has previously been issued in this State, or the sale or transfer of a new or used motor vehicle by a dealer duly

registered with the Secretary of State as required by the laws of this State and duly enfranchised by a manufacturer of motor vehicles or by an authorized distributor of such manufacturer, or the sale or transfer of a used motor vehicle by a dealer duly licensed as provided in this Act, shall, in each such case, be *prima facie* evidence to the Secretary of State that the purchaser or transferee is the owner of such vehicle and legally entitled to make application for a certificate of title therefor; provided, that if the Secretary of State, from examination of the application for a certificate of title for any such vehicle, or by other evidence available to him, is of the opinion that such applicant is not the owner of the vehicle, he shall not issue a certificate of title therefor but shall cause a thorough investigation to be made of the source and antecedents of such title and the right of such applicant to a certificate of title. Where application is made for a certificate of title for a new or used motor vehicle not previously titled in this State and not sold or transferred under any of the above enumerated conditions establishing a *prima facie* case of ownership in the purchaser or transferee, the Secretary of State shall not issue a certificate of title therefor, but shall cause a thorough investigation to be made of the source and antecedents of such title and the right of such applicant to a certificate of title.

If, as a result of any investigation of title herein authorized, the Secretary of State is satisfied as to the validity of the title and ownership of the applicant, and that such applicant does not owe any tax imposed by the Use Tax Act, he shall issue a certificate of title in accordance with the terms of this Act. The Secretary of State, in his discretion, may combine the application for a certificate of title with the application for the certificate of registration.

Passed in General Assembly June 28, 1955.

Approved July 14, 1955. (Ill. Rev. Stat. Vol. 2, p. 823.)

No. 482

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 482

BURGESS-NORTON MFG. CO.,
Appellant,

vs.

RICHARD J. LYONS, ET AL.,
Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS.

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Pursuant to paragraph 3 of Rule 16 of the Revised Rules of the Supreme Court of the United States, appellant submits this brief in opposition to appellee's motion to dismiss the appeal. Appellant submits that the questions presented by this appeal, as noted on page 3 of its jurisdictional statement, are substantial.

The Equal Protection Issues Are Substantial.

In our jurisdictional statement, we demonstrated that the Illinois Use Tax Act creates an arbitrary and unreasonable classification in violation of the equal protection clause of the Fourteenth Amendment. It taxes purchasers from persons engaged in the business of retailing for the use

of the property they purchase. It does not tax purchasers from persons deemed in service occupations. Yet in many instances the taxed and the tax free purchase identical property capable of identical uses. For example, those who buy ready-to-wear clothes subject to alterations are taxed, those who buy tailor-made clothes are not; those who buy machinery not produced to their special order are taxed, those who buy machinery produced to their special order are not taxed.

The classification is based upon differences between sellers who are not taxed, not between purchasers some of whom are. There are in fact no material differences between the purchasers who are taxed and those who are not. There being no differences, there can be no question of relating differences to a legislative purpose, and, thus, no justification for the discrimination under the equal protection clause. This point was made at pages 16 and 17 of our jurisdictional statement. Appellees apparently have no answer and have offered none.

Ignoring this argument, appellees extend only one apology for the patent discrimination: that similar distinctions are made in the Retailers' Occupation Tax Act and that the Illinois Use Tax Act "complements" that act. We pointed out in our jurisdictional statement that the purported justification is without merit. Appellee's arguments to the contrary ring hollow.

The Illinois Supreme Court admitted that if the "complement" defense failed, the uniformity requirement of the Illinois Constitution would be violated[1] and, thereby, further admitted that there was no other conceivable basis upon which the classification could be sustained. There is

1. The Court stated: "The argument would, we think be persuasive if the use tax stood alone, for so far as use by the purchaser is concerned there is no distinction between a tailor made suit of clothes, for example, and one purchased at retail.", Jurisdictional Statement, p. 47.

no difference between the standard of classification required by the uniformity provisions of the Illinois Constitution and that required by the equal protection clause of the Fourteenth Amendment, *Ohio River & W. R. Co.* v. *Dilley*, 232 U. S. 576, 590; *Lake Superior Consol. Iron Mines* v. *Lord*, 271 U. S. 577, 581; *The People* v. *St. Louis Bridge Co.*, 357 Ill. 245, 253. Thus the court below admitted that if the "complement" defense failed, as it does, appellant would be denied equal protection of the laws.

We urged in our jurisdictional statement that the Illinois Use Tax Act effectively repeals the Retailers' Occupation Tax Act and, thus, can not be said to "complement" it. Despite the fiction that retailers pocket use tax which they collect and remit the occupation tax imposed upon them, the evident fact is that the use tax is in each instance paid into the state treasury, and the retailers' tax is never paid into the state treasury. Practically, therefore, the Retailers' Occupation Tax Act is a nullity as a taxing statute. It is thus nonsensical to suggest that the discriminations of the Illinois Use Tax Act are to be justified on the ground that it "complements" the retailers' act.

Appellees answer that the use tax, when collected by retailers obliged to remit the occupation tax, is not paid into the state treasury but is retained by the retailers. This argument emphasizes form and ignores substance.

Appellees also point to cross-references in the Use Tax Act to the Retailers' Occupation Tax Act, and to recent amendments to the latter act as evidence of a lack of intention on the part of the legislature to repeal the retailers' act. This argument misses the point. The question is not what the legislature intended to do, but what it did. By enacting the Use Tax Act the legislature rendered the Retailers' Occupation Tax Act a nullity as a taxing statute. Since no tax is practically exacted by the latter act, it

cannot be said that the retailers' act taxes part of a whole, and the Use Tax Act the remainder. Thus, it cannot be said that the two acts are complementary.

Even assuming that the retailers' tax is paid into the state treasury, and the use tax collected is retained by the retailers, the two acts are still not complementary in any sense that relieves the Use Tax Act of its discriminatory character. As we noted in our jurisdictional statement, in *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, the Washington use tax was not deemed discriminatory as to interstate commerce because those who purchased in intrastate commerce were subject to the sales tax. To describe the two taxes as "complementary" was both logical and correct. But here the discrimination remains whether or not the Use Tax Act and Retailers' Occupation Tax Act are considered together. While appellees seek much support in the decision of this Court in the *Henneford* case, they do not deny the validity of this contention.

Appellees heavily stress the purpose of the Use Tax Act. This purpose, they say, was to protect Illinois merchants against competition with out-of-state sellers not subject to the retailers' tax, and to produce revenue for the State that would otherwise be lost. This purpose was achieved by taxing persons buying property outside Illinois for use in Illinois. That such was the purpose of the act, and that the purpose was achieved, we did not deny in our jurisdictional statement and do not deny now. But the discrimination of the Use Tax Act is in no way related to such a purpose. As we pointed out in our jurisdictional statement, the purpose would have been achieved even if purchasers from those engaged in service occupations had also been taxed, and the discrimination had thereby been removed.

It is no answer for appellees to suggest that the purpose would also have been achieved if users who produce

their own property, such as farmers, had also been taxed. Appellant is not complaining of the failure of the act to tax farmers. There is a substantial difference between purchasers and producers. Appellant is complaining of the failure to tax purchasers from servicemen, who buy identical property and put it to identical uses. This, we say, is discriminatory, and this discrimination is unrelatable to the legislative purpose emphasized by appellees.

Nor is it any answer for appellees to state, as they do on page 17 of their motion to dismiss, that the discrimination is justified "because the purpose under discussion is fully accomplished without bringing new kinds of local transactions within the tax base." This does not relate the discrimination to the broad purposes under discussion but only a purpose of making the same exemptions in the two acts.

Nor is it any answer that the other use tax acts which have been before this Court had similar purposes and were sustained. Those cases (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167; *General Trading Co.* v. *State Tax Commission*, 322 U. S. 335; *Nelson* v. *Sears Roebuck & Co.*, 312 U. S. 359; *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373; but see *Miller Bros. Co.* v. *Maryland*, 347 U. S. 340) sustained the principle of use tax legislation under the commerce clause. No such discrimination as that presented by the Illinois Use Tax Act was involved. We do not claim that the Use Tax Act violates the commerce clause. We do assert that its discriminatory character deprives appellant of the equal protection of the laws.

The only purpose to which the discrimination is relatable is that of making the same exemptions under the Use Tax Act as are made by the Retailers' Occupation Tax Act. This is a purpose predicated on form, not on substance. We do not believe that taxpayers should be denied equal

protection of the laws in the interest of form, rather than substance. Furthermore, such a purpose ignores the fact that the Retailers' Occupation Tax is a tax on retailers while the Use Tax is imposed upon purchasers. Certainly it is arbitrary and unreasonable to apply the same classification tests to different groups, retailers and purchasers, when such application results in discrimination against many purchasers.

Moreover, as we noted in our jurisdictional statement, the Illinois legislature did not even consistently adhere to its purpose of not broadening the base of the Retailers' Occupation Tax Act. The Use Tax Act imposes a tax on the value of trade-ins; the retailers' tax does not. Certainly if discrimination is to be condoned in the interest of one act not broadening the base of another, consistency should be required. Appellees devote four pages (21-24) of their Motion to Dismiss to proof that the different treatment of trade-ins is not discriminatory. We do not deny that now, and did not do so in our jurisdictional statement. The discussion is irrelevant.

In support of the purpose of making the exemptions the same under the Use Tax Act and the Retailers' Occupation Tax Act, appellees urge that this is what other use tax acts do, and, therefore, Illinois should be able to do the same thing. What other states do is, of course, essentially irrelevant to the validity of what Illinois has done. But it should be said that other states have had no difficulty in avoiding the discrimination resulting from the classification made by the Illinois Use Tax Act. The Michigan Use Tax Act, for instance, though it complements a retailers' occupation tax act,[2] taxes not only purchasers from persons

2. C. C. H. Michigan State Tax Reporter, ¶ 60-001.

engaged in the business of selling tangible personal property, but purchasers from servicemen as well.[3]

In *Walters* v. *City of St. Louis*, 347 U. S. 231, this Court stated (p. 237):

> "The power of the State to classify according to occupation for the purpose of taxation is broad. Equal protection does not require identity of treatment. It only requires that classification rest on real and not feigned differences, that the distinction have some relevance to the purpose for which the classification is made, and that different treatments be not so disparate, relative to the difference in classification, as to be wholly arbitrary.'"

The classification of the Use Tax Act does not rest on differences between the taxed and the tax free. It is wholly arbitrary and unreasonable. The decision of the court below is, accordingly, unsound. We agree with Justice Davis when he said of that decision, in dissenting.[4]

> "The Court's decision has effectively removed many of the basic constitutional limitations on the taxing power. If this is to be done, it should be done by a well considered constitutional amendment and not by fiat of this court."

With reference to the discrimination of the Use Tax Act resulting from its failure to provide for refunds to purchasers who return the property they purchase but who paid the use tax in the first instance to the Department of Revenue, that part of Section 10 quoted by appellees does not eliminate the discrimination. This appellees once admitted, for they stated in their answering brief[5] in *Turner*

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3. The exemption contained in the original Michigan Use Tax Act of "property purchased from a seller who is not engaged in the business of selling tangible personal property", § 4(e), Public Act 94, 1937, was deleted by the amendment of Public Act 273, 1949.

4. Jurisdictional Statement, p. 55.

5. R. 72.

v. *Wright*, 11 Ill. 2d 161, 142 N. E. 2d 84 filed in the Illinois Supreme Court at page 12:

> "The refunds contemplated by the Act are contingent upon an Illinois retailer's obtaining a refund. This is precisely the type of refund that is provided for by the Retailers' Occupation Tax Act."

The Due Process Issue Is Substantial.

As we have stated, while the Use Tax Act in form authorizes retailers to retain the use tax which they collect to the extent they are remitting retailers' occupation tax on the same transaction, in practical effect the use tax reaches the state treasury, and the retailers' tax does not. Practically, therefore, the Retailers' Occupation Tax Act is rendered a nullity as a taxing statute. It is then idle for appellees to assert that the discriminatory character of the Use Tax Act is to be justified by its relationship to the occupation tax act

While appellees implicitly admit the conclusion, if the premise is correct, by not denying it, they do not accept the premise. They insist that the use tax is in fact retained by the retailers who collect it.[6] If they are right in this, then, as we urged in our jurisdictional statement, use taxpayers are forced to relinquish their property for a private purpose in violation of due process requirements.

Appellees argue that the offset provision was not intended to profit anyone, but was aimed simply at preventing two taxes from reaching the state treasury. Nonetheless, the salient fact is that if the money is in fact retained by the retailers, the provision does work to the financial benefit of the retailers. Comparably, in *Loan Association* v. *Topeka*, 87 U. S. (20 Wall) 655, 665, it was argued that

6. Though on page 19 of their Motion to Dismiss filed in *Turner* v. *Wright*, No. 405 in this Court, appellees appear to argue the contrary.

the benefit conferred, by taxation of private individuals, upon private manufacturers was intended to benefit the public at large. Yet the argument was rejected, and the taxation held to be for a private purpose in violation of due process requirements. The fallacy of appellees' reasoning becomes graphic when it is considered that the alleged primary purpose of the offset provision would have been just as well accomplished if the act had directed retailers to distribute the funds collected among the families of state officials.

Appellees also urge that the offset provision was dictated by the peculiarities of Illinois law, and is, therefore, justified. It would be no comfort to the Illinois taxpayer who must give up his own funds for some other private person's benefit to know he had to do so because of peculiarities of Illinois law. Clearly, there is no justification for depriving persons of their fundamental rights in deference to such flimsy necessities.

Conclusion.

The motion to dismiss should be denied, and this Court should note probable jurisdiction of this appeal because of the substantial federal questions involved.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 482

BURGESS-NORTON MFG. CO.,

Appellant,

vs.

RICHARD J. LYONS, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS.

MOTION TO DISMISS APPEAL

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MOTION TO DISMISS APPEAL FROM THE SUPREME COURT OF ILLINOIS

Pursuant to Rule 16(b) of the Revised Rules of the Supreme Court of the United States, appellees in the above entitled case move to dismiss the appeal on the ground that no substantial federal question is presented.

OPINION BELOW

The opinion of the Illinois Supreme Court sustaining the validity of the Use Tax Act in the instant case is reported in 11 Ill. 2d at page 294. The Illinois Court held that this case was governed by the decision in *Turner* v.

Wright, 11 Ill. 2d 161, 142 NE 2d 84. In this connection the Illinois Court said at page 295:

> "The questions raised in this proceeding were determined at the March term of this Court in *Turner* v. *Wright*, *ante*, p. 161, wherein we held the Use Tax Act to be constitutional, and wherein the present plaintiff filed brief and argument as amicus curiae. Therefore the judgment of the trial court is affirmed."

Turner v. *Wright* is presently pending on appeal to this Court at the October term in Docket No. 405. The appellees, here, are also the appellees in the *Turner* case and have filed a similar motion to dismiss the appeal in that case on the ground that no substantial federal question is presented.

QUESTION PRESENTED

Where, as here, the Illinois Court has found that the Illinois Use Tax satisfies the requirements of equal protection of the laws under the Illinois Constitution, and there is no question of the tax being a burden on interstate commerce, have appellants presented a substantial federal question under the claim that said Act violates the equal protection clause of the 14th Amendment of the United States Constitution.

STATUTE INVOLVED

The statute involved is the Illinois Use Tax Act (Pars. 439.1-439.18, Ch. 120, Vol. 2, pgs. 816-820, Ill. Rev. Stats. 1955).

STATEMENT

Nature of Illinois Use Tax Act

The Illinois Use Tax Act was designed to and does complement the admittedly valid Retailers' Occupation Tax Act.

Under the Use Tax Act, a tax is imposed "upon the privilege of using in this State tangible personal property purchased at retail * * * from a retailer." (Par. 439.3, Ch. 120, Ill. Rev. Stats. 1955, Vol. 2, p. 817). The use tax is imposed at the same rate as the tax under the Retailers' Occupation Tax Act. It applies whether the property is purchased in Illinois or elsewhere. Retailers are required to collect the tax from users by adding the tax to the selling price of the tangible personal property when it is sold for use. (Par. 439.3, Ch. 120, Ill. Rev. Stats. 1955, Vol. 2, p. 817).

The use tax does not apply to out-of-state transactions that would not measure a tax under the Retailers' Occupation Tax Act if they occurred in Illinois, nor is it applicable to the use of property purchased outside of Illinois on which a sales or use tax has been paid to another State, to the extent of the tax so paid. (Par. 439.3, Ch. 120, Ill. Rev. Stats. 1955, Vol. 2, p. 817).

A reading of pertinent provisions of the Act clearly demonstrate its complementary character and the studied effort of the legislature to avoid unfairness or inequality of the tax burden imposed by both Acts in question.

To prevent double taxation i.e., the application of the Retailers' tax and the use tax to the sale of the same tangible personal property, the Use Tax Act provides for off-setting the taxes in question in the following manner in Par. 439.9, Ch. 120, Ill. Rev. Stats. 1955, Vol. 2, p. 818 which is Section 9 of the Act:

> "The first remittance shall be due on or before September 15, 1955, for the tax collected during the preceding calendar month, but a retailer need not remit that part of any tax collected by him to the extent he is required to remit, and does remit the tax imposed by the Retailers' Occupation Tax Act with respect to the sale of the same property."

Clear evidence of the complementary character of the two Acts in question and the legislative intention that only one tax shall apply to any transaction is found in Par. 439.3, Ch. 120, Ill. Rev. Stats. 1955, Vol. 2, p. 817 which is Section 3 of the Act:

> "If the seller of tangible personal property for use would not be taxable under the Retailers' Occupation Tax Act despite all elements of the sale occurring in Illinois, then the tax imposed by this Act shall not apply to the use of such tangible personal property in this State."

Adequate safeguards against actual or likely multi-state taxation are found in Par. 439.3, Ch. 120, Ill. Rev.

Stats. 1955, Vol. 2, p. 817, which is section 3 of the Act. These provisions forbid the application of the tax in the situations summarized as follows:

(1) Where a non-resident brings property into the State temporarily or while passing through the State;

(2) Where the property is acquired outside this State and is moved into this State for use as rolling stock moving in interstate commerce;

(3) Where a similar tax has been paid in another State to the extent of the amount of such tax so paid in the other State.

(4) Temporary storage of property acquired outside and brought in and used solely outside the State or attached to property used solely outside the State.

NO SUBSTANTIAL FEDERAL QUESTIONS ARE PRESENTED BY THIS APPEAL

ARGUMENT

I.

Summary

The Illinois Use Tax Act is not unique legislation in any respect. It was designed to and does complement the admittedly valid Retailers' Occupation Tax Act. The object and purpose of the Act is identical with the acts of many other states namely, to equalize the tax burdens which heretofore were unequal and discriminated against Illinois citizens and Illinois retail merchants as the Retailers' Occupation Tax Act, standing alone, could not reach out-of-state purchases and transactions in interstate commerce. (*Norton Co.* v. *Department of Revenue*, 405 Ill. 314, vacated and remanded *Norton* v. *Department of Revenue*, 340 U. S. 534)

As the Use Tax applies primarily to goods shipped into Illinois in interstate commerce and purchases of goods made outside the State for use within the State, the practical effect of this complementary taxing system is to afford the Illinois retail merchant some measure of protection against competition with out-of-state sellers not subject to a retailers' tax. Furthermore, it produces revenue for the State that would otherwise be lost. Thus protection of the Illinois merchant is, in fact, protection also for the

valid Retailers' Occupation Tax. If the Illinois retailer is forced out of business or deprived of part of his business by a tax that does not reach his out-of-state competitor this revenue is lost to the State. In addition, some Illinois citizens were not carrying their fair share of the State's tax burden as they made purchases in other states to avoid the payment of local retailers' tax.

The very purpose of the Use Tax Act is to establish uniformity of the legal and economic burden of taxation for purchasers and users of tangible personal property sold at retail and to provide a uniform tax basis consistent with the pronouncements of the Illinois Court and this Court. Appellant's argument is directed to the form and mechanics of the imposition of the tax and wholly fails, as we will hereinafter demonstrate under Points II and III of this brief, to establish that the Act is unconstitutional as a denial of equal protection of the law.

The equal protection clause of the 14th Amendment does not prevent Illinois from adjusting its system of taxation in all proper and reasonable ways or compel Illinois to adopt an iron rule of equal taxation. (*Bell's Gap Railroad* v. *Pennsylvania* 134 U. S. 232, 237; *Merchant's Bank* v. *Pennsylvania* 167 U. S. 461, 464). The power of the state in respect to the matter of taxation is very broad so far as the Federal Constitution is concerned and it may

be laid down as a general rule that mere inequality or exemptions in the matter of state taxation are not forbidden by such Constitution. (*Beers* v. *Glynn* 211 U. S. 477, 484-85). When the constituted authority of the State undertakes to exert the taxing power, and the question of its action is brought before this Court, every presumption in its favor is indulged and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action. (*Walters* v. *City of St. Louis* 347 U. S. 231, 237-238).

There is no question here involved that this tax is a burden on interstate commerce. In this connection the Illinois Court in its opinion in *Turner* v. *Wright*, 11 Ill. 2d. 161 at p. 164 said:

> "The validity of the Statute under the Commerce Clause of the Federal Constitution is not challenged * * *."

This Court has repeatedly sustained Use Tax Acts of other states based on his same scheme of complementary laws as not violating the commerce clause of the U. S. constitution. (*Henneford* v. *Silas Mason Co.*, 300 U. S. 577; *Southern Pacific Co.* v. *Gallagher*, 306 U. S. 167; *General Trading Co.* v. *State Tax Commission of Iowa*, 322 U. S. 335; *Nelson* v. *Sears Roebuck & Co.*, 312 U. S. 359; *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373.)

In *Henneford* v. *Silas Mason Co.*, 300 U. S. 577, this Court sustained the validity of the use tax of the State of

Washington, and approved its purpose and object, which is identical with the Illinois tax, by saying at page 581:

> "The plan embodied in these provisions is neither hidden nor uncertain. A use tax is never payable where the user has acquired property by retail purchase in the state of Washington, except in the rare instances in which retail purchases in Washington are not subjected to a sales tax. On the other hand, a use tax is always payable where the user has acquired property by retail purchase in or from another state, unless he has paid a sales or use tax elsewhere before bringing it to Washington. The tax presupposes everywhere a retail purchase by the user before the time of use. If he has manufactured the chattel for himself, or has received it from the manufacturer as a legacy or gift, he is exempt from the use tax, whether title was acquired in Washington or elsewhere. The practical effect of a system thus conditioned is readily perceived. One of its effects must be that retail sellers in Washington will be helped to compete upon terms of equality with retail dealers in other states who are exempt from a sales tax or any corresponding burden. Another effect, or at least another tendency, must be to avoid the likelihood of a drain upon the revenues of the state, buyers being no longer tempted to place their orders in other states in the effort to escape payment of the tax on local sales. Do these consequences which must have been foreseen, necessitate a holding that the tax upon the use is either a tax upon the operations of interstate commerce or a discrimination against such commerce obstructing or burdening it unlawfully?"

In view of the previous decisions of this Court, and the lack of merit in appellant's specific contentions that the Use Tax Act violates the 14th Amendment of the United States constitution, this appeal should be dismissed. We will take up and dispose of appellant's specific contentions under Points II and III of this brief.

II.

THE ILLINOIS USE TAX DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES

Section 3 of the Illinois Use Tax Act,[1] in exempting purchases at retail in kinds of transactions in which the seller would not incur retailers' occupation tax liability if all elements of the sale occurred in Illinois, does not create a discriminatory classification in violation of the Fourteenth Amendment of the Constitution of the United States. If a Use Tax Act is to complement a sales tax law or an occupation tax law, it is not unreasonable for the Use Tax Act to be predicated on the same classification (and therefore to contain the same exemptions) as the law that is being complemented. On the contrary, no matter what the exemptions in the law that is being complemented may be, it is entirely logical for the complementing statute to contain the same exemptions except for the loophole or loopholes which the complementing statute is designed to close. A Use Tax Act is generally aimed only at broadening the tax base to the extent of closing an interstate commerce loophole (i.e., to the extent of taxing out-of-State purchases that cannot be reached under the sales tax or occupation tax law that is being complemented) and (in the case of the

[1] Illinois Revised Statutes, 1955, Chapter 120, Paragraph 439.3, vol. 2, p. 817.

Illinois Constitution, because of the State Court's interpretation of it[2]) to the extent necessary to tax the same kinds of purchases when made in Illinois since the retailers' occupation tax (unlike the sales taxes of most states) does not technically and legally fall on the buyer when he does his buying in Illinois. However, there is no constitutional requirement or other good reason which would make it necessary or even desirable for the Illinois use tax to go even further and try to tax kinds of transactions (such as isolated or occasional sales made by persons who are not retailers; sales that are incidental to the seller's engaging in a service occupation, etc.) which are not subject to the Illinois Retailers' Occupation Tax Act[3]—the law that is being complemented. In the required respects, the Illinois Use Tax Act is complementary except in an immaterial, nondiscriminatory respect as to the value of trade-ins, which will be discussed more fully herein later.

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[2] Compare *People* v. *Carpentier*, 2 Ill. (2d) 468, 118 N. E. (2d) 429 (which invalidated a use tax which sought to complement the retailers' occupation tax as to motor vehicles, but which was levied only on purchases made outside Illinois) with *Johnson* v. *Halpin et al.*, 413 Ill. 257, 108 N.E. (2d) 429—Certiorari denied—345 U. S. 923, 73 S. Ct. 781, 97 L.ed. 668 (which sustained the Illinois Cigarette Use Tax Act in complementing the Illinois Cigarette Tax Act by means like those employed by the Legislature in making the present Use Tax Act complement the Retailers' Occupation Tax Act—i.e., by having the use tax apply to local purchases as well as to out-of-State purchases, and by having the retailer who has collected the use tax from the purchaser retain this tax to the extent to which he is liable to pay and does pay retailers' occupation tax to the State on the same sale).

[3] Illinois Revised Statutes, 1955, Chapter 120, Paragraphs 440, 453, vol. 2, pp. 820-823.

On the question of classification, which can come into question in relation to the "equal protection" clause of the Fourteenth Amendment of the Constitution of the United States, this Court has often said that it will not disturb the State Legislature's establishment of a classification unless the distinctions resulting from the classification are so arbitrary and unreasonable as to have no apparent basis in fact. For example, see *Heisler* v. *Thomas Colliery Co.*,[1] in which this Court upheld the action of the Pennsylvania Legislature in classifying bituminous coal differently from anthracite coal for tax purposes. Although both items are coal, the Court pointed out that there are differences in the physical properties and the uses of the two types of coal and that this would be sufficient to justify the Legislature of Pennsylvania in imposing a tax applicable to the one type of coal, but not applicable to the other. The Court made it clear that it would not disturb the classification made by a State Legislature for tax purposes unless the classification was so arbitrary and unreasonable as to have no apparent basis in fact whatever. There is nothing arbitrary or unreasonable about exempting purchases from sellers who are not retailers from a Use Tax Act which seeks to complement a tax law whose scope is limited to the taxation of sales that are made by retailers. On the contrary, it would be unreasonable to demand that the

[1] 260 U. S. 245.

complementing use tax reach out and tax kinds of uses which are not within the statute that is being complemented when a question of its application to a seller who makes sales for use arises.

The Illinois Supreme Court justified the classification by which the Illinois Use Tax Act does not tax every conceivable kind of use (but seeks only to tax the kinds of transactions—purchases at retail from retailers—which are subject to the retailers' occupation tax when the question of the seller's tax liability on an Illinois sale is involved) in the following language:

> "There are actions that the retailers' tax does not reach, because although they involve the physical transfer of personal property at retail, the element of service is so pronounced that it has been thought to dominate the element of sale. (See, e.g., *Mahon* v. *Nudelman*, 377 Ill. 331; *Huston Brothers Co.* v. *McKibbin*, 386 Ill. 479.) The use tax also exempts these transactions, and plaintiff argues that because it does so it is unconstitutional. While the distinctions that have been drawn are admitted to be relevant to an occupation tax upon retailers, they are said to be irrelevant, and therefore arbitrary and discriminatory, when included in a tax that falls upon the privilege of using property purchased at retail.
>
> "The argument would, we think, be persuasive *if the use tax stood alone*, for so far as use by the purchaser is concerned there is no distinction between a tailormade suit of clothes, for example, and one purchased at retail. But the tax before us does not stand alone. *It is designed to complement and to protect the tax imposed upon the occupation of selling at retail, and the validity of its exemptions is to be determined in the light of that purpose.* The question here is not whether the legislature *is required* to shape the use

tax that it imposes to conform to the tax upon retailers, but whether it *may constitutionally do so.* We think that it may. The purpose of the use tax is to protect the base of the retailers' tax and the classification adopted is reasonably directed to this end. Whether the General Assembly could go further and broaden the base of the use tax beyond the limits of the occupation tax upon retailers is not before us.'"[5]

(Emphasis supplied.)

Appellant appears to be trying to establish the dilemma that Illinois cannot constitutionally do what other use tax states have accomplished, unless Illinois makes the use tax serve not only the accepted function of broadening the tax base so that purchasers pay a tax on kinds of sales that are already subject to a local tax whether the purchases are made in the taxing state or outside such state, but also the function of broadening the base of the retailers' occupation tax to include all purchases of any kind from anyone anywhere for use in Illinois. Yet this latter kind of broadening of the local tax base has not been the historical function of a use tax and has not been required in other states to make the use tax constitutional. For example, the Iowa Use Tax Act exempts the use of tangible personal property the gross receipts from the sale of which are exempted from the retail sales tax by the terms of the Iowa sales tax law.[6] Similarly, the Kansas Use Tax Act provides

[5] *Turner* v. *Wright*, 11 Ill. (2d) 161, at pages 169 and 170; 142 N.E. (2d) 84.

[6] Iowa—Commerce Clearing House Reports—Page 6131, Paragraph 60-279.

that it does not apply in respect to the use, in Kansas, of tangible personal property brought into or used in Kansas if such property would not have been subject to the tax under the provisions of the Kansas Retailers' Sales Tax Act if purchased in Kansas.[7] Other examples of the same kind of coextensive exemption are those in Arkansas[8] and Colorado[9] use tax laws. These provisions correspond in their significance to the catch-all exemption provision in Section 3 of the Illinois Use Tax Act[10] to the effect that the use of the property is not subject to the use tax if the seller would not incur retailers' occupation tax liability despite all elements of the sale having occurred in Illinois. In practically all states, the use tax exempts some kinds of uses and does not, by any means, apply uniformly to every kind of use or to every kind of out-of-state purchase for use.[10]

If the use tax laws of other states do not violate "equal protection" requirements even though they fail to

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[7] Kansas—Commerce Clearing House Reports—Page 6112, Paragraph 60-253.

[8] Arkansas—Commerce Clearing House Reports—Page 6102, Paragraph 60-241.

Colorado—Commerce Clearing House Reports—Page 6128, Paragraph 60-250.

[9] Illinois Revised Statutes, 1955, Chapter 120, Paragraph 439.3.

[10] For example, for a list of exemptions from the State of Washington use tax, see Washington—Commerce Clearing House Reports—Pages 6127 through 6132, Paragraphs 60-202 through 60-214; for a list of specific exemptions from the Kansas use tax, see Kansas—Commerce Clearing House Reports—Pages 6112 through 6114, Paragraphs 60-254 and 60-255.

tax all kinds of uses (and use tax laws have been uniformly upheld by this Court in relation to the "equal protection" clause), why should the Illinois Use Tax Act have to go farther in order to be constitutional? The obvious answer is that use taxes that complement occupation or sales taxes do not have to go beyond them and tax every kind of use in order to satisfy "equal protection" requirements, unless this Court is prepared to invalidate almost every use tax law in the country because of the fact that it does not tax every kind of use (or every kind of purchase for use) that there is, or because the use tax does not exactly complement its related sales tax on account of exempting something that is not exempted by the sales tax law or on account of taxing something which the related sales tax law does exempt.[11]

Very few sales or use tax laws tax isolated or occasional sales (Washington being an exception), so Illinois is not unique in this, as appellant would seem to imply. Is this Court going to hold all these other states' use tax laws to be violative of Federal equal protection requirements because of exempting this class of sales or purchases for use or because of exempting any other specific class of sales or purchases for use?

[11] For example, the State of Washington use tax applies to isolated or occasional sales for use even though sales of this character are exempted from the Washington sales tax (Washington Commerce Clearing House Reports—Page 6130, Paragraph 60-150 and Page 6127, Paragraph 60-203). Most states do not tax isolated or occasional sales under either the sales tax or the use tax law.

Appellees submit that the Illinois use tax does have the customary purpose of any Use Tax Act; that this is a reasonable and substantive purpose, and that the classification employed in the Use Tax Act is reasonable in relation to the purpose of that Act and therefore consonant with the requirements of the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

Appellant argues that the desire to reach out-of-State purchases does not justify failing to tax purchasers from persons engaged in service occupations. Appellees reply that the purpose of taxing out-of-State buying does justify the failure to tax purchasers from Illinois and out-of-State servicemen where the Act that is being complemented does not tax similar transactions, because the purpose under discussion is fully accomplished without bringing new kinds of local transactions within the tax base. To hold otherwise would be to require the Use Tax Act to serve a purpose not generally required of use tax laws. It would mean requiring the use tax to serve a second and distinct purpose, which is completely independent of and in addition to the normal objective of placing out-of-State buying and intrastate buying on the same footing insofar as kinds of transactions that are already subject to the local tax are concerned.

Appellant contends that if the Use Tax Act taxed purchasers from servicemen, the Act still would achieve its

purpose of taxing out-of-State buying. That would also be true if the Use Tax Act went even further and tried to tax users of tangible personal property who produce the property themselves, or even users of all kinds of property (including intangibles and real estate), but the Legislature certainly does not have to make the use tax take on this last mentioned function in order to be constitutional. It should be sufficient that the Use Tax Act does what has been expected of use tax laws throughout the country over the years, and that expectation does not require trying to reach new kinds of transactions, but merely includes the requirement of trying to put what is already taxed on the same basis legally and economically whether the purchase is made in the taxing state or outside such state.

Appellees submit that, on the point that the "equal protection" clause of the Fourteenth Amendment of the Constitution of the United States is not violated, the instant case is controlled in appellees' favor by this Court's decision in *Henneford et al.* v. *Silas Mason Company, Inc.*,[12] which sustained the constitutionality of the Washington Use Tax Act. Appellant attempts to distinguish the Henneford case and also the case of *Gregg Dyeing Company* v. *Query et al.*[13] by saying that those use taxes applied only

[12] 300 U. S. 577.
[13] 286 U. S. 472.

to purchases made outside the taxing state whereas the Illinois use tax applies to purchases that are made within Illinois or outside Illinois. However, appellant admits that the sales taxes which were being complemented by the use tax laws under consideration in the Henneford case and in the Gregg Dyeing Company case taxed purchasers who made similar purchases at retail within the taxing states. Consequently, the total legal and economic effect of the Illinois retailers' occupation tax plus the Illinois use tax would be the same as that of the sales taxes plus the use taxes that were involved in the Henneford and Gregg Dyeing Company cases.

Appellant contends that the Retailers' Occupation Tax Act has been impliedly repealed; that the Illinois Use Tax Act therefore stands alone, and that on this basis the use tax classification of taxing purchasers who buy from retailers while not taxing purchasers who buy from non-retailers cannot be justified. It seems rather obvious that if the Illinois Legislature had meant to repeal one of its most important revenue statutes which has been on the books for more than 24 years (it became effective July 1, 1933), the Legislature would have expressly repealed such statute and not left it to a matter of implication and therefore to conjecture. On the contrary, it seems clear that the Retailers' Occupation Tax Act continues to have vitality and continues to be the keystone of the retail excise

tax structure in Illinois, with the Use Tax Act being built around the Retailers' Occupation Tax Act. The Legislature's intention to supplement the retailers' occupation tax with the use tax, rather than to substitute the use tax for the retailers' occupation tax, is evidenced by the offset provision in Section 9 of the Use Tax Act which appellant criticizes as violating "due process" requirements and which allows the retailer to retain the use tax that he collects to the extent to which he is liable to pay and does pay retailers' occupation tax to the Department on the same transaction. Similar evidence of the Legislature's intention to continue the Retailers' Occupation Tax Act in effect is found in the fact that there are numerous other cross references to the retailers' occupation tax and the Retailers' Occupation Tax Act in the Use Tax Act.[1] These cross references would not be necessary (and in fact would be meaningless and farcical) if the Legislature had thought that the Retailers' Occupation Tax Act would not be in effect any longer. The Illinois Legislature has further recognized the continued existence of the Retailers' Occupation Tax Act this year by amending it on several occasions at the 1957 Legislative session. All evidence points emphatically to the continued existence of the Retailers'

[1] Such cross references will be found in Sections 2, 3, 6, 7, 8, 9 and 14 of the Use Tax Act (Illinois Revised Statutes, 1955, Chapter 120, Paragraphs 439.2, 439.3, 439.6, 439.7, 439.8, 439.9 and 439.14).

Occupation Tax Act. In fact, without the Retailers' Occupation Tax Act from which the Use Tax Act incorporates numerous sections by reference,[2] the Use Tax Act itself would be lacking in most of its enforcement procedures and might be too incomplete to constitute a law.

Appellant contends that the Use Tax Act does not complement the Retailers' Occupation Tax Act for the reason that, where traded-in property is a part of the consideration for a sale, the use tax applies to more of the selling price than the retailers' occupation tax does because the use tax applies to the receipts in money plus the value of the trade-in, whereas the retailers' occupation tax applies only to the receipts in money. However, this produces no discrimination and does not result in any financial gain to any private person. If the user makes his purchase outside Illinois from an unregistered seller, so that he pays the use tax directly to the State, he will pay 2½% of the full selling price (money paid plus the value of the trade-in). If the user makes his purchase from a registered retailer, he will pay the same amount of use tax to the seller. The seller is required by Section 9 of

[2] Section 12 of the Use Tax Act (Illinois Revised Statutes, 1955, Chapter 120, Paragraph 439.12), in incorporating numerous Sections from another Statute by reference, failed to specify that the other statute is the Retailers' Occupation Tax Act, but that was clearly the Legislature's intention from an examination of the entire Act, and the Illinois Supreme Court so found in its opinion in *Turner* v *Wright*, 11 Ill. (2d) 161, at page 173.

the Use Tax Act[18] to remit the use tax that he collects to the State except to the extent that he has an offsetting retailers' occupation tax liability on the same transaction. In such a case, the retailer would pay 2½% of the receipts in money to the State as retailers' occupation tax, and he would pay 2½% of the value of the trade-in to the State as use tax. But the State would get all of the tax (2½% on the full selling price, including the receipts in money and the value of the trade-in), and the user would pay the same amount of tax whether he pays the tax to the State or to the retailer.

In its opinion in this case, the Illinois Supreme Court pointed up the foregoing explanation in the following passage:

> "There is, however, one respect in which the use tax does not precisely complement the retailers' occupation tax. The former tax is based upon 'selling price,' the latter on 'gross receipts' from sales. 'Selling price' is defined in both statutes to mean the consideration for a sale valued in money whether received or paid in money or otherwise, 'including cash, credits, service and property of every kind or nature * * *.' (Ill. Rev. Stat. 1955, chap. 120, pars. 439.2, 440.) By an amendment in 1955, however, the definition of 'gross receipts' in the Retailers' Occupation Tax Act was amended so that it 'means the total selling price * * *, excluding therefrom any amount allowed as credit for tangible personal property taken in trade.' (Ill. Rev. Stat. 1955, chap. 120, par. 440.) The result of this discrepancy in definitions is that in cases in which property is received in trade as a part of the pur-

[18] Illinois Revised Statutes, 1955, Chapter 120, Paragraph 439.9, vol. 2, p. 818.

chase price, the tax due may not be the same under the two statutes. For example, if a new car is purchased for $3000 and the buyer's old one is received in trade at $1000, the use tax will be $75. Under the Retailers' Occupation Tax Act, however, the value of the old car would not be included in the 'gross receipts' on which the tax is computed, so that the tax would be $50. 'The retailer, however, is required to remit to the Department the full $75, because he is excused from remitting the use tax that he collects only to the extent that he remits the retailer's tax with respect to the same transaction.' No discrimination between purchasers is involved in this situation, because each purchaser is required to pay the same amount as every other purchaser. And there is no unjust enrichment of the retailer, for he is required to remit to the Department the full amount that he has collected. That the two taxes are not precisely identical therefore deprives no one of any constitutional rights.'"[1]

It is further pointed out that a Use Tax Act does not violate equal protection requirements of the Federal Constitution simply because such Act does not meticulously follow the law that it seeks to complement and because there are some variances or discrepancies between the two Acts. An examination of practically every sales and use tax combination in the country will show that they do not cover exactly the same kinds of transactions with the use tax only adding the feature of taxing out-of-state purchases which would be subject to the complemented sales tax if the purchases were made in the taxing state. In particular, a use tax law is not invalid because of taxing something

[1] *Turner* v. *Wright*, 11 Ill. (2d) 161, at pages 168 and 169, 142 N.E. (2d) 84.

to which the complementary sales tax does not apply. For example, as was mentioned previously in a footnote, the State of Washington use tax applies to isolated or occasional sales for use even though the Washington sales tax does not apply to transactions of that character.[18] Nevertheless, this Court upheld the Washington use tax law as not violating equal protection requirements of the Fourteenth Amendment of the Constitution of the United States.[19] Although the Washington use tax law taxes isolated or occasional sales, most states do not tax isolated or occasional sales under either the sales tax or the use tax law.

There is no merit or substance to appellant's contention that the Use Tax Act violates the equal protection clause of the Fourteenth Amendment of the Constitution of the United States by providing for a tax refund when property is returned by the purchaser to the seller in the case of taxpayers who purchase from and remit the use tax to registered retailers, but not when property is returned by the purchaser to a seller who is not registered to collect the use tax so that the purchaser will have paid the use tax directly to the State of Illinois.

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[18] Washington—Commerce Clearing House Reports—Page 6110, Paragraph 60-150 and Page 6127, Paragraph 60-203.

[19] *Henneford et al.* v. *Silas Mason Company, Inc.*, 300 U. S. 577.

The purchaser who pays the use tax directly to the State under Section 10 of the Use Tax Act[20] is entitled to the returned merchandise credit (when applicable) because Section 10, in effect, so states by incorporating, into itself (Section 10), the applicable provisions of Section 9[21] which are not already spelled out in their own way in Section 10. The pertinent sentence in Section 10 of the Use Tax Act reads as follows:

> "To the extent to which they may be pertinent, all of the provisions of Section 9 with reference to returns and payments shall be applicable to the returns and payments herein required."

The provision in Section 9 of the Use Tax Act relative to the credit on returns for returned merchandise would thereby be incorporated by reference into Section 10 of the Act and would apply to users who remit use tax directly to the Department. It seems clear, therefore, that appellant has misconstrued or misunderstood the Use Tax Act on the point under discussion because all users who pay the use tax to anyone are entitled to a returned merchandise credit under the proper circumstances either under Section 9 or under Section 10 of the Act, so the discrimination which appellant complains of simply does not exist.

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[20] Illinois Revised Statutes, 1955, Chapter 120, Paragraph 439.10, vol. 2, p. 819.

[21] Illinois Revised Statutes, 1955, Chapter 120, Paragraph 439.9, vol. 2, p. 818.

II.

SECTION 9 OF THE ILLINOIS USE TAX ACT DOES NOT VIOLATE DUE PROCESS REQUIREMENTS

The offsetting provision in Section 9 of the Illinois Use Tax Act[2] does not result in a gift of public funds for a private purpose and does not constitute a taking of private property without due process of law in violation of the Fourteenth Amendment of the United States Constitution. Appellant's contention that the Illinois Retailers' Occupation Tax Act has been repealed by implication or otherwise has already been dealt with fully and answered by appellees under Point I of this motion.

Assuming that the Retailers' Occupation Tax Act has not been repealed, appellees believe that the Illinois Supreme Court dealt effectively in its opinion in the Turner case (which controlled the disposition of this case in the Illinois Supreme Court) with appellant's contention that the offsetting provision in Section 9 of the Use Tax Act constitutes a gift of public money for private purposes, in the following excerpt from the Court's opinion:

> "While the plaintiff concedes that the constitution does not prohibit the imposition of a complementary use tax, he argues that the present statute is invalid. He points to the fact that other States that have use taxes impose them only upon the purchase of property outside the State for use within it, and he argues that the Illinois tax is not complementary because it falls

[2] Illinois Revised Statutes, 1955, Chapter 120, Paragraph 439.9, vol. p. 818.

upon purchases made within the State as well as upon those made outside, and thus introduces a new tax upon domestic transactions. The act requires the Illinois retailer to collect the use tax upon the sales he makes. It does not require him to remit that tax to the State, however, to the extent that he remits the retailers' occupation tax with respect to the sale of the same property. (Section 9.) Plaintiff also contends that this setoff provision provides for a gift of public funds to private individuals, permits the commutation of taxes and provides for the cancellation of a debt due to the State, all in violation of the constitution. Const., art. IX, secs. 6 and 7; art. IV, sec. 23.

"The statute provides for a use tax that falls alike on those who purchase at retail within the State and those who purchase outside of it. That tax is to be collected by the Illinois retailer, but to the extent that he remits the tax due under the Retailers' Occupation Tax Act he is not required to remit the tax due under the Use Tax Act. The tacit assumption of the statute is that by this mechanism the tax advantage that was enjoyed by the buyer who purchased outside the State will be eliminated, without increasing the burden upon the buyer who purchases within the State. The accuracy of that assumption is not challenged. The Illinois retailer is required to remit one tax of 2½ per cent with respect to each sale within the State. That is the same tax that is levied with respect to each out-of-State purchase for use within the State. It is true that the scheme of this tax is more complex than that of a use tax that falls only on out-of-State purchases. But its purpose and its results are those of the typical use tax, and the formal differences in the method by which those purposes are accomplished do not affect the validity of the statute.

"It is not intended that both taxes shall reach the treasury with respect to a single transaction. It is intended and provided that one tax, and only one, shall reach the State treasury with respect to each purchase of property for use within the State, whether or not the purchase is made within Illinois. To that end the statute provides that the use tax collected by the re-

tailer does not constitute a debt owed by him to the State when he 'is relieved of the duty of remitting such tax to the Department by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act upon his gross receipts from the same transaction.' (Section 8.). *Only if the way in which the two taxes are interrelated is ignored is it possible to say that there is here a gift of public funds, commutation of taxes, or the cancellation of a debt owing to the State. The method by which the two taxes are integrated may be cumbersome, but it is not unconstitutional.*" (Emphasis supplied.)[23]

When the true purpose and function of the offset provision in Section 9 of the Illinois Use Tax Act is thus understood and considered, it should be apparent that the object of that purpose is a public purpose and that it does not result in a gift of public funds for a private purpose. Therefore, no private property is being taken without due process of law in violation of the Fourteenth Amendment of the Constitution of the United States. Is it not reasonable to say that something which is really just a formality, but which is necessary to satisfy Illinois constitutional requirements of uniformity as interpreted by the Illinois Supreme Court, is justifiable and serves a public purpose where the total legal and economic effect is no different than it would have been if the procedure employed had been copied after that which is in use in other states which are

[23] *Turner* v. *Wright*; 11 Ill. (2d) 161, at pages 166, 167 and 168, 142 N.E. (2d) 84.

free, under their State Constitutions, to employ such other procedure or form of statutory enactments?[24]

The offset provision under consideration is not for the *benefit* (meaning profit or financial gain) of anyone, but is simply aimed at preventing two taxes from reaching the State Treasury on Illinois sales. It is submitted that this is a justifiable public purpose and not a gift of public funds for private purposes, and that no one in the process is being deprived of property without due process of law. There is therefore no Federal question of substance presented by appellant's contention that the offsetting provision in Section 9 of the Illinois Use Tax Act violates due process requirements of the Fourteenth Amendment of the Constitution of the United States.

[24] In *People* v. *Carpentier*, 2 Ill. (2d) 468, 118 N.E. (2d) 315, the Illinois Supreme Court had held that a use tax on motor vehicles could not be levied without violating the Court's understanding of the Illinois constitutional requirement of uniformity where such use tax applied only to purchases made outside Illinois. This was true, the Court found, because the statute that was being complemented (the Retailers' Occupation Tax Act), though applying to retail sales of motor vehicles in Illinois, was levied on the seller rather than on the purchaser, so there would technically be no legal burden of a tax on purchasers who bought their motor vehicles in Illinois. Earlier, in *Johnson* v. *Halpin*, 413 Ill. 257, 108 N.E. (2d) 429—Certiorari denied—345 U. S. 923, 73 S. Ct. 781 97 L.ed. 668, the Illinois Supreme Court had upheld the constitutionality of the Cigarette Use Tax Act which employed the same mechanics (including the offsetting provision in the hands of tax collecting sellers) in complementing the Illinois Cigarette Tax Act as that employed by the Illinois Legislature in this instance in making the Use Tax Act complement the Retailers' Occupation Tax Act

CONCLUSION

For the foregoing reasons it is respectfully submitted that this appeal from the judgment of the Supreme Court of Illinois should be dismissed as it does not present a substantial Federal question for the decision of this Court.

Respectfully submitted,

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